Supreme Court, U.S.
FILED

09-405 APR 20 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

Docket No.

In The

Supreme Court of the United States

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendant-Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Bruce H. Darian
P.O. Box 42
Hollywood, CA 90028
Tel. 310-428-8131
Fax 310-374-0134
In Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Relator is a person who is expressly authorized to bring suit on his own behalf and on behalf of the Government.

2. The State is a person under the False Claims Act

3. Relator is broadly protected as a Whistleblower, both under the False Claims Act and under the Federal Water Pollution Control Act (Clean Water Act)

4. The FCA has original jurisdiction over all claims, both federal and state and pre-empts all other actions.

5. Relator's constitutional right to due process was violated by ruling without hearings.

6. The Government has no claim without Relator's continuing right to prosecute his claims.

7. Plaintiff presented triable issues to the Court which should have precluded granting Summary Judgment for the remaining Defendant's on the RICO claims.

8. The Ninth Circuit Court abused it's discretion in not allowing a final extension of time to file the Opening Brief given the fact it was supported by a doctors letter and was unopposed by all parties to the appeal.

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

UNITED STATES OF AMERICA ex rel. DARIAN

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMMENT OF PARKS AND RECREATION, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, CALIFORNIA CONTRACTORS STATE LICENSE BOARD, CALIFORNIA OCCUPATIONAL SAFTEY AND HEALTH ADMINISTRATION, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, JUDICIAL COUNCIL OF CALIFORNIA, LOS ANGELES SUPERIOR COURT, LOS ANGELES SUPERIOR COURT SANTA MONICA, LOS ANGELES COUNTY SANITATION DISTRICT #2, LOS ANGELES COUNTY DISTRICT ATTORNEY, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, MALIBU LOST HILLS DIVISION, LAS VIRGENES MUNICIPAL WATER DISTRCT, CITY OF MALIBU, PEPPERDINE UNIVERSITY, GOVERNOR GRAY DAVIS, CALIFORNIA

ATTORNEY GENERAL BILL LOCKYER, HONORABLE PATRICIA COLLINS, HONORABLE LAWRENCE MIRA, COMMISSIONER TERRY ADAMSON, RUSTY AREIAS, REGINALD DEMERY,IAN GAVINE, DAVE PETTWAY, TIM LA FRANCHI, TARA TODD, DARLENE ATKINSON, DOUGLAS WITT, TOM CARVER, GARY STEVENS, RICHARD BARTON, C. LANCE BARNETT, MIKE BROWN, PAM ALBERTI, MARIANE HENKEL, GLORIA R. LANGLEY, JANEECE R. HARDS, BILL SIENER, RENE GARCIA, DENNIS DICKERSON, WENDY PHILLIPS, LEROY BACA, MARTIN L. HERSCOWITZ, MIKE WILSON, ALLYSON KIMMEL, MARNA MILLER, JOHN O'BRIEN, THOM BRADSTOCK, PAT MAY, ERNESTO MASSONE, DON WIPPERT, CHRISTI HOGIN, JAMES COLBAUGH, WAYNE K. LEMIEUX, PHIL E. PHILLIPS, AMERICAN INTERNATIONAL COMPANIES, AMERICAN INTERNATIONAL GROUP, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH INC., MALIBU BAY CO., LAMBERSON KOSTER & CO., INTERNATIONAL HARDWOODS, SUPERIOR GUNITE INC., ACCENT BUILDERS INC., FYFE CO. INC., FIBRWRAP CONSTRUCTION CO. INC., DCA DRILLING AND CONSTRUCTION INC., HALCO SERVICE CORP., BOOKOUT PLUMBING INC., ARROW SECURITY, A. JEROLD PERENCHIO, ANTHONY LAWRENCE FEDERICO, RONALD RAY FEDERICO, ED N. FYFE, HEATH CARR, HAROLD ORUM, HAROLD BOOKOUT, ROBERT G. KELLY, SUSAN GANNUSCIO, DON ROBINSON, DOES 1-10

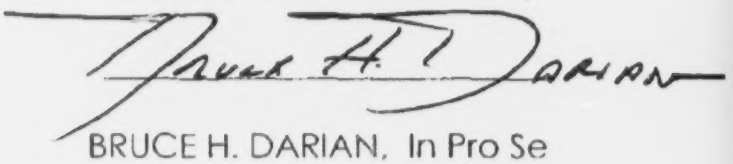
Defendants -Respondents

CORPORATE DISCLOSURE STATEMENT

Appellant, Relator Bruce Darian owner of Darian Construction Co. is a sole proprietorship.

DATED: August 27, 2009

Respectfully Submitted By:



BRUCE H. DARIAN, In Pro Se
P.O. Box 42
Hollywood, CA 90078

TABLE OF CONTENTS

Table of Authorities . . . . . viii-xi

Statement of Jurisdiction 1

Statement of the Case 1-11

Introduction 12-18

Statement of Facts 18-25

Argument I 25-32

Argument II 32--36

Argument III 36-37

Argument IV 37-54

Argument V 54-57

Argument VI 57

Argument VII 58-59

Argument VIII 59-62

Standard of Review 62-66

Conclusion 66-68

Statement of Related Cases 68

TABLE OF AUTHORITIES

United States Supreme Court

Vermont v. Stevens,
529 U.S. 765; 120 S. Ct. 1858; 146 L. Ed. 2d 836;. . . . .
. . . . . .35, 58

Steel Co. v. Citizens for Better Environment,
523 U.S. 83, 93-102, 140 L. Ed. 2d 210, 118 S. Ct. 1003
(1998) 27

Friends of Earth, Inc. v. Laidlaw Environmental
Services (TOC), Inc.
528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)
(slip op., at 9 28

Whitmore v. Arkansas
495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717
(1990) 28

Simon v. Eastern Ky. Welfare Rights Organization,
426 U.S. 26, 41, 48 L. Ed. 2d 450, 96 S. Ct. 1917
(1976). 28

Lujan v. Defenders of Wildlife
504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130
(1992) 29

Poller v. Columbia Broadcasting System, Inc.
368 U.S. 464, 465, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)
. 30

Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.,
339 U.S. 827, 829, 94 L. Ed. 1312, 70 S. Ct. 894 (1950)
. 30

Hubbard v. Tod,
171 U.S. 474, 475, 43 L. Ed. 246, 19 S. Ct. 14 (1898) . .
. 31

Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer,
515 U.S. 528, 531, 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995) 31

Musick, Peeler & Garrett v. Employers Ins. of Wausau,
508 U.S. 286, 288, 124 L. Ed. 2d 194, 113 S. Ct. 2085 (1993). 31

Ashwander v. TVA,
297 U.S. 288, 348, 80 L. Ed. 6881936), 56 S. Ct. 466 . .
. 33

Mistretta v. United States
488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) 63

Bowsher v. Synar,
478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) 63

Communications Workers of America v. Beck
487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). 63

Fullilove v. Klutznick,
448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) 64

Botsford v. Blue Cross
314 F.3d 390,393 U.S. 2002 U.S. App. LEXIS 26457 65

9th Circuit Cases

Roach v. Mail Handlers Benefit Plan, CAN,
298 F.3d 847, 849 (9th Cir. 2002). 65

Gray v. First Winthrop Corp.,
989 F.2d 1564, 1567 (9th Cir. 1993). 63

U.S. ex rel. Kelly v. Boeing
9 F.3d 743 at 757 (9th Cir. 1993) 5, 6, 7, 64

Delta Savings Bank v. United States
265 F.3d 1017, 1024 (9th Cir. 2001) 65

STATUTES

31 U.S.C. § 3729 (a) 18, 26, 33, 54

§ 3730(a) 27

§ 3730(b)(1) 27

§ 3730(b)(2) 42, 56, 57

§ 3730(c)(1) 57

§ 3730(c)(2). 57

3 W. Blackstone, Commentaries *160 27

Article III of the Constitution 27, 28, 29

2 W. Blackstone, Commentaries *437 30

L. Simpson, Law of Suretyship 205 (1950) 31

31 U.S.C. §§ 3729-3733 . . . . . .33, 53

AMENDMENT XIV; Section 31

H. R. Rep. No. 2, 37th Cong., 2d Sess.,
pt. ii-a, pp. XXXVIII-XXXIX (1862) 34

Fed. R. App. P. 32 (a)(7)(c) 69

vi

STATEMENT OF JURISDICTION

Filing date of this Petition was extended by the Clerk for 60 days from the June 30, 2009 due date, which derived from the January 20, 2009 Order of Ninth Circuit Court of Appeals.

VII

STATEMENT OF THE CASE

Relator Bruce Darian filed a False Claims Act Qui Tam action under seal and serving only the U.S Attorney General and the U.S. Attorney's office for Los Angeles in U.S. District Court for the Central District on September 21, 2000. (C.T. 1)

After several months and several volumes of Disclosure Statements supplying the Government

with all material evidence, the Government filed a motion to unseal the action, allow Relator the unfettered right under the statute to conduct the action and be served with all briefing, orders, and all other correspondence in the event it elects to intervene and prosecute the case.

The Court granted the Motion and ordered the Qui Tam action be served in accordance with FRCP by Relator Bruce Darian on his own behalf and in the name of the United States Government.

Relator was forbidden from serving a 60 day notice of Intent to sue under the FWPCA on the defendants until which time the case was unsealed other wise the existence of the Qui Tam action would have been revealed to the

Defendants before which time the Government had time to assess the Qui Tam action.
Relator served the required notice allowed 60 days to pass, and then served the False Claims Act action on the Defendants in August of 2001.
Additionally the Court had granted an extension past the 120 days to serve any remaining Defendants because of the 60 day waiting period under the FWPCA citizen provisions.

All of the Defendants filed Motions to Dismiss citing FRCP 12 b 6, FRCP 8 and FRCP 9 or in the alternative a more defenite statement.
On December 10, 2001 the Court granted all of the Defendants Motions citing FRCP 8. That Relator had not complied with rule 8 because all Defendants were listed with all causes of actions.
This order was without prejudice and allowed

Relator to amend the complaint, except for the State of California and it's agencies which were with prejudice citing the 11th Amendment Immunity.

Relator amended his complaint and reserved it on the Defendants in January 2002. Defendants filed a Motion to Dismiss citing the exact same rules under FRCP. The United States Government as Plaintiff filed an amicus brief requesting the motions not be granted and that Defendant Pasternak's contention that Relator was only representing himself was argued by the Government that it was important that the proper interpretation of the statute be followed and that Relator Darian did have the right by way of the clear wording of the Act, the legislative history, Congress' intention to root out fraud and the

binding authority in the Supreme Court case *Vermont v. Stevens* and this Court's binding precedent in Kelly v. Boeing. The Court did not hold a hearing but instead took the motions under submission and did not rule until four and a half months later on September 5, 2002.

Once again the Court ruled for the Defendant's stating that Relator had violated FRCP 9 by not pleading with the required particularity, but rejected the Defendants claim that Relator continued to violate FRCP 8. The stated that the Defendants were on clear notice of their alleged wrong doing. The Court additionally granted Defendant Pasternak who is a state court receiver in a related state court action motion to dismiss without prejudice on the premise that the State Court judge (who is Defendant Honorable Patricia

Collins vacate her injunction barring any action in federal court under the False Claims Act providing it was not inconsistent with any federal order).

'Defendants Collins, Mira and Adamson were all dismissed with prejudice under Absolute Judicial Immunity.

The Court sua sponte ordered the case title to be amended in February 2002, removing the United States. and upon an unopposed motion brought by Relator in September 2002 after the rulings cited binding 9th circuit court precedent U.S. ex rel. Kelly v. Boeing stating that Relator has the full right to conduct the case for himself and in the name of the Plaintiff Government as the real party in interest.

In December 2002 Relator filed a 394 page 3rd amended complaint with exhibits totaling 911

pages a second 3rd Amended Complaint was served about two weeks later due to typing errors. The Defendants filed motions to dismiss citing FRCP 12 b 6, FRCP 9 and revisiting what Defe3ndant Pasternak had advanced in February 2002 (that Darian can only represent himself and no one else.)

The Court had already addressed this matter by hearing the Government in it's brief cite Vermont v. Stevens and Kelly v. Boeing.

Additionally the Defendants did not file any opposition to Relator's motion to correct the case title to reflect that the United States was and continues to be the Plaintiff and real party in interest.

Defendants cited a District Court case from the central district in which Nira Swartz had stipulated to not having authority to conduct a FCA action

and requested the assistance of counsel at the governments expense which is in violation of the statute which requires the action be conducted at the Relator's expense.

The Court once again rejected any hearings and stated it would rule on the motions in chambers. After almost four months Relator brought a motion a 3rd motion to consolidate all of the federal and state litigation arising from the same set of operative facts to the FCA action which the statute requires.

The Court denied the Motion to Consolidate the cases and an Appeal ensued on August 2003. Relator removed according to statute the state court action which was before the 2nd Appellate Court to the U.S. District Court. This case was assigned to the Honorable Dickran Teverizian. This action was remanded to the 2nd Appellate Court

without hearing and the 2nd Appellate Court dismissed the action pending a motion for clarification of the brief submitted.

The appeal was dismissed for lack of jurisdiction and the case was remanded to the district court.

In January 2005 the district court granted the defendants motions to dismiss without prejudice, however the court now added the requirement that Relator could not continue with the action unless the complaint was filed by a licensed attorney.

Relator filed an appeal to those orders

Additionally the Government has filed yet another amicus brief stating it did not want the Accent Builders Defendants dismissed.

The Ninth Circuit dismissed the appeal in July of 2006 stating it did not have jurisdiction and the case was remanded to the district court. The

Defendants had filed motions to dismiss the case before the Appellate court had remanded the case which were rejected by the district court. However when the case was remanded the court granted all of the motions to dismiss stating that Relator had not filed a 4th Amended Complaint as ordered by a licensed attorney.

The Court denied the Accent Builders and Superior Gunite Defendant's motion to dismiss the RICO claim and the Court put the case at issue.

Defendant Fyfe filed for interlocutory certification which was denied, Defendant Pasternak filed a month later and the Court granted that motion, however denied Lamberson Koster, Accent Builders and International's motion for attorney fees.

Relator sought discovery which was impeded by the Accent and Superior defendants. Relator

brought a motion before the discovery magistrate for disputed discovery. This motion was denied without oral hearing even though it was requested. Relator brought another discovery motion which was again denied without hearing before the discovery magistrate.

Defendant's had a pending Motion for Summary Judgement which Relator responded to. Oral Argument was requested on this long and drawn out case. This request along with every other request for hearing was denied.

The Court granted Defendants motions in July of 2007. Relator brought a motion for reconsideration which was denied in September 2007.

The United States rejected the courts dismissal and the court amended the order to not implicate the United States in October 2007.

Relator filed his timely appeal.

VIII

INTRODUCTION

Relator Bruce Darian was a long standing community leader in the City of Malibu. Relator grew up surfing at the famous beach in early 1974. Has a residence on the beach 200 feet from the Malibu Pier's property. Relator was a charter member of the State of California's Adopt-A-Beach program from 1991- 2001 on Pacific Coast Hwy, served as Co Chair of Malibu's Public Safety Committee from 1993-1997, receiptiant of a City of Malibu Commendation for removal of graffiti, member of Optimist International's Malibu Charter, sponsor of numerous sports teams on the college, high school and organized little leauge levels as well as scouting. Relator received a letter from the

City of Malibu in grateful appreciation for exemplary service as the Contractor in the renovation of the Los Angeles Sheriff station to it's new City Hall in Malibu.

Relator for many years while living on the beach right next to the Malibu Pier, had a vision to restore the famous landmark. Relator stated making serious preparations to become involved right after sucssessfully building the new City Hall in 1994. The Malibu Pier was closed of at the shore line to the public in January 1994. Relator finished the City Hall on February 25, 1994.

The City of Malibu hired the engineering company of Moffit & Nicols to evaluate the condition and the cost to rebuild a new pier. The choices were Monolithic, steel piles coated with polyethylene

and wood decking, or an all wood H15 or H10 rated pier (15 or 10 ton capacity). The City elected the all wood 10 ton and put it out for bid. Several bids came in, however, the City retracted the bidding and did nothing in the summer of 1994.

At this same time Relator was working with a renownd biologist and water quality expert to stop the out flow of sewage and effluent to Malibu Canyon. Relator had circulated and received hundreds of signatures to stop the illegal discharging to Malibu Creek.

For the next three years Defendants City of Malibu, County of Los Angeles and Department of Parks and Recreation were negotiating how the pier would be rebuilt, who would run the pier and who would finance it.

All of this came to a head when the winter months of 1997 were approaching in September. The City having experience with the Paradise Cove Pier being completely broken apart except for a very short portion at the shore line in 1983 voted to terminate it's control of the pier and relinquish it back to the Department of Parks and Recreation who purchased it with the tax payers money of California in 1980 at auction from Bill Hubert.
At this same time Relator had already fully photographed the entire pier from the pier itself, the shoreline and the water photographing every piling of the pier. Relator submitted to the City of Malibu a bid of 197,000.00 to fully install 1 ¼ " diameter stainless steel cable with steel collars to prevent the pier from coming apart during large surf in the approaching el nino winter of 1997.

The State acknowledged the proposal, but elected to have tug boats on stand by in the event the pier came apart during large surf. (This method would be totally ineffective being that 8 foot plus surf would prevent any boat from coming within range of the pier without the threat of being crushed into the pier by the surf.

The winter came and went without incident.

In winter of 1998 Relator worked with officials and was granted three small contracts to install new roofing on the outer west building, a new back flow main valve, new fire stand pipes which brought back the fire system being operational. Additionally drove test probes at several locations on the pier to determine the bedrock profile for pile driving purposes. The only other work performed to this date on the pier as part of this

rebuilding project was the sampling and testing of hazardous material and it's subsequent report which was incorporated into the contract documents.

Plaintiff United States of America ex rel. Darian brought suit for himself and for, the United States Government, See 31 U.S.C. § 3730(a)(b). U.S. Relator Darian brought suit against several state, county and city officials in both their official and individual capacities and several private corporations and their officers including Pepperdine University, Las Virgenes Metropolitan Water District, and Los Angeles County Sanitation and Los Angeles County Sheriff's Department. The case is derived from the illegal contracting activities at the Malibu Pier restoration, and the illegal activities in discharging pollutants into a

tributary of a United States navigable water and directly discharging into U.S waters in violation of the False Claims Act, Federal Water Pollution Control Act, and the Resource Conservation Recovery Act. known as FCA, FWPCA, and RCRA (Excerpt No. C.R.1, 384). 31 U.S.C. § 3729, 33 USCS 1365, 42 USCS 6972

IX

STATEMENT OF FACTS

1. On May 20, 1999 Appellant/Relator drafted, signed and personally drove to Sacramento to submit a bid drafted by Relator to the Department of Parks and Recreation in Sacramento, California. The bid was to rebuild the Malibu Pier, bid opening was at 2:00 P.M. in which Appellant/Relator was present along with two other representatives from

other contracting entities who submitted bids for the Malibu Pier. Accent Builders took no part in drafting the bid, nor was anyone from Accent present at bid opening. (Excerpt No. C.R. 384).

2. On September 22, 2000 Relator (Appellant) filed a False Claims Act action under seal in the United States District Court (Excerpt No. C.R. 1).

3. On May 18, 2001 the Court ordered the seal lifted along with the notice by the United States of America to decline intervention, requesting all pleadings and authorizing Relator to conduct the action.. (Excerpt No. C.R. 19).

4. On June 29, 2001 Relator gave 60 day notice to the defendants of the False Claims Act action and of an intent to sue under the Federal Water Poliution Act 33 USC 1365 (Excerpt No. C.R. 21).

5. On August 27, 2001 Relator filed his First Amended Complaint before serving the defendants in the action (Excerpt No. C.R. 26).

6. On August 28, 2001 Relator filed an Ex Parte application to stay all further state court proceedings and enjoining related state cases. (Excerpt No. C.R. 24)

7. On December 12, 2001 the Court granted the defendants motions to dismiss the First Amended Complaint and granted Relator 30 days to file an amended pleading. (Excerpt No. C.R. 215, 154, 155, 142)

8. On January 10, 2002 Relator filed his Second Amended Complaint

9. On February 15, 2002 Relator sought to transfer the state action BC249677 to Federal Court or for a stay of the action in state court.

10. On March 28, 2002 Plaintiff U.S. Government under the False Claims Act filed a request for an amicus curiae brief to be filed in opposition to the motions to dismiss.

11. On April 10, 2002 the Plaintiff U.S. Government filed an amicus curiae brief in opposition to David J. Pasternak and Pasternak, Pasternak and Patton's motion to dismiss

12. On August 2, 2002 Relator filed motions for sanctions against several defendants for failure to develop and submit a legitimate discovery plan

13. On August 22, 2002 Relator brought again a motion to transfer related state cases to the federal court.

14. On September 5, 2002 the Court granted the defendants motion to dismiss the Second Amended Complaint and granted Relator the

right to file a Third Amended Complaint. (Excerpt No C.R. 341 thru 356).

15. On December 30, 2002 Relator filed his Third Amended Complaint . (Excerpt No. C.R. 384).

16. On April 2, 2003 The Court on it's own motion continues the hearing on the motions to dismiss (Excerpt No. C.R. 473).

17. On April 7, 2003 the Plaintiff United States Government files an opposition to various motions to dismiss (Excerpt No. C.R 481-482).

18. On April 24, 2003 the Court, on it's own motion takes under submission all of the motions without hearings or oral argument. (Excerpt No. C.R. 488).

19. On July 7, 2003, Relator files a motion to remove state lawsuits to federal qui tam false claims act suit (Excerpt No. C.R. 501).

20. On July 22, 2003 the court denies Relators motion to remove state lawsuits (Excerpt No. C.R. 507).

21. On October 30, 2003 the court grants plaintiff's motion to restore the case title to include the United States name that was improperly removed by the court on a previous order. (Excerpt No. C.R. 520).

22. On January 7, 2005 the court grants all of the Defendants motions to dismiss under the FCA because Relator does not have or is not an attorney. (Excerpt No. C.R. 528- 540).

23. On September 22, 2005 the court denies Plaintiff's ex parte applications for enlargement of time to file an opposition (Excerpt No. C.R. 578).

24. On October 5, 2005 the Plaintiff U.S. Government objects to the dismissal of any

potential claims of the United States Government. (Excerpt No. C.R. 587).

25. On November 22, 2005 the court dismisses many defendants from the 3rd amended complaint for not filing a 4th amended complaint by an attorney (Excerpt No. C.R. 622).

X

SUMMARY OF ARGUMENT

1. The Court committed clear error in misinterpreting the FCA and CWA statutes in dismissing Relator's causes of action on the sole basis that Relator is not a lawyer.

2. State is expressly named as a "person" under the False Claims Act.

3. Relator is broadly protected as a whistleblower.

4. The FCA Super Pre-empts all other actions because the original source provisions are jurisdictional , concurrent or state jurisdiction actions could enable the plaintiffs in a state action to defeat the FCA by the very act of discovery in the action. Defendants in the federal FCA action could plead that the facts were part of a civil action in another court and seek dismissal on jurisdictional grounds .
The FCA expressly provides that no other person shall interfere with (31 U.S.C. 3730(b)(2)(5)).

5. Court violated Relator's right to due process by not allowing hearings on Defendant's numerous motions to dismiss a False Claims Act action.
6. The Government does not have any right to any claims without Relator.
7. Plaintiff presented triable issues to defeat the Motion for Summary Judgement.

XI

ARGUMENT 1

RELATOR IS EXPRESSLY AUTHORIZED TO BRING SUIT ON HIS OWN BEHALF AND ON BEHALF OF THE GOVERNMENT

Originally enacted in 1863, the False Claims Act (FCA) is the most frequently used of a handful of extant laws creating a form of civil action [***843] known as *qui tam*. [1] [HN1] As amended, the [*769] FCA imposes civil liability upon "any person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729 (a). The defendant is liable for up to treble damages and a civil penalty of up to $ 10,000 per claim. *Ibid.* [HN2] An FCA action may be commenced in one of two

ways. First, the Government itself may bring a civil action against the alleged false claimant. § 3730(a). Second, as is relevant here, a private person (the "relator") may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." § 3730(b)(1).

Qui tam is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on our Lord the King's behalf as well as his own." The phrase dates from at least the time of Blackstone. See 3 W. Blackstone, Commentaries *160.

[***LEdHR2B] [2B]We first address the jurisdictional question whether respondent Stevens has standing under Article III of the Constitution to maintain this suit. See *Steel Co. v. Citizens for Better*

Environment, 523 U.S. 83, 93-102, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998).

[***LEdHR4] [4][HN5] As we have frequently explained, a plaintiff must meet three requirements in order to establish Article III standing. See, e.g., *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, , 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (slip op., at 9). First, he must demonstrate "injury in fact" -- a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990) (internal quotation marks and citation omitted). Second, he must establish causation -- a "fairly . . . traceable" connection between the alleged injury in fact and the alleged conduct of the defendant. *Simon* v. *Eastern Ky. Welfare Rights*

Organization, 426 U.S. 26, 41, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976). And third, he must demonstrate redressability -- a "substantial likelihood" [**1862] that the requested relief will remedy the alleged injury in fact. *Id.*, at 45. These requirements together constitute the "irreducible constitutional minimum" of standing, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), which is an "essential and unchanging part" of Article III's case-or-controversy requirement, *ibid.*, and a key factor in dividing the power of government between the courts and the two political branches, see 504 U.S. at 559-560.

3 Blackstone noted, with regard to English *qui tam* actions, that "no particular person, A or B, has any right, claim or demand, in or

upon [the bounty], till after action brought," and that the bounty constituted an "inchoate imperfect degree of property . . . [which] is not consummated till judgment." 2 W. Blackstone, Commentaries *437.

[HN11]

We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. [4] Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits, see, e.g., [*774] *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 465, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962); *Automatic*

Radio Mfg. Co. v. *Hazeltine Research, Inc.*, 339 U.S. 827, 829, 94 L. Ed. 1312, 70 S. Ct. 894 (1950); *Hubbard* v. *Tod*, 171 U.S. 474, 475, 43 L. Ed. 246, 19 S. Ct. 14 (1898) -- and also suits by subrogees, who have been described as "equitable assignees," L. Simpson, Law of Suretyship 205 (1950), see, *e.g.*, *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U.S. 528, 531, 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995); *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 288, 124 L. Ed. 2d 194, 113 S. Ct. 2085 (1993). We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

AMENDMENT XIV; Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4. The Validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.

XII

ARGUMENT 2

A FALSE CLAIMS ACT QUI TAM ACTION BY RELATOR IN FEDERAL COURT DOES NOT RUN AFOUL OF THE ELEVENTH AMENDMENT

This case presents the question whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U.S.C. §§ · 3729-3733.

We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is "a serious doubt" on that score. *Ashwander* v. *TVA*, 297 U.S. 288, 348, 80 L. Ed. 6881936), 56 S. Ct. 466 ((Brandeis, J., concurring) [***855] (internal quotation marks and citation omitted). [18]

[**1873] The False Claims Act is also all-embracing in scope, national in its purpose, and as

capable of being violated by state as by individual action. [2] It was enacted during the Civil War, shortly after a congressional committee [*792] had decried the "fraud and peculation" by state officials in connection with the procurement of military supplies and Government contracts -- specifically mentioning the purchases of supplies by the States of Illinois, Indiana, New York, and Ohio. See H. R. Rep. No. 2, 37th Cong., 2d Sess., pt. ii-a, pp. XXXVIII-XXXIX (1862). Although the FCA was not enacted until the following year, the Court of Appeals for the Second Circuit correctly observed that "it is difficult to suppose that when Congress considered the bills leading to the 1863 Act a year later it either meant to exclude the States from the 'persons' who were to be liable for the presentation of false claims to the federal government or had forgotten the results of this extensive investigation."

162 F.3d 195, 206 (1998). That observation is faithful to the broad construction of the Act that this Court consistently endorsed [***858] in cases decided before 1986 (and hardly requires any "suspension of disbelief" as the majority supposes, *ante*, at 16, n. 12).

DISSENT
JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

Vermont v. Stevens

1. Defendant Judge Patricia Collins, Commissioner Terry Adamson, Judge Lawrence Mira, Receiver David Pasternak were in clear absence of all jurisdiction.
2. Approving payments to contractors for their criminal contracting falsifications which were a long and well documented fraud.

3. Rigged Contracts, Falsified Change Orders, Falsified Payroll, Falsified Specifications, Falsified Stop Notices, Falsified Licenses, Falsified Receivership, False Statements, Terrorist Threats, False Arrest, Falsified Investigations, False Sheriff Reports, Falsification of State Documents. Falsified Pile Driving Logs, Falsified Safety Procedures, Falsified Environmental Certifications

XIII

ARGUMENT 3

RELATOR IS BROADLY PROTECTED AS A WHISTLEBLOWER, BOTH UNDER THE FALSE CLAIMS ACT AND UNDER THE FEDERAL WATER POLLUTION CONTROL ACT (CLEAN WATER ACT)

1. Relator was arrested for protected whistleblower activity.
2. Relator was falsely arrested under color of law.

3. State Inspector had a meeting of the minds with the others in a n effort to inhibit the documentation of false and defective work which was clearly in violation of federal law.

4. Defendant's actions clearly damaged Relator's employment opportunities and was meant to oppress the revelation of corrupt act

XIV

ARGUMENT 4

THE FCA HAS ORIGINAL JURISDICTION OVER ALL CLAIMS, BOTH FEDERAL AND STATE AND PRE-EMPTS ALL OTHER ACTIONS.

1. The purpose of the Complete Pre-emption doctrine is congress' intent of protecting federal jurisdiction for cases involving the federal False Claims Act.
2. The doctrine supports not having concurrent federal and state cases going simultaneously. 31 U.S.C. § 3730 (b)(5) is intended to prevent a double recovery from the defendants. Relator has no means of collecting in state court and is essentially "out of court." (Quackenbush v. Allstate citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp, 460 U.S. 1, 11, n. 11.)

3. False Claims Act defendants will try to raise the issue of res judicata if a state case proceeds ahead of the False Claims case. (Erikson ex rel. United States v. American Institute of Biological Services 716 F. Supp. 908, 918 Ed Va 1989)
4. False Claims Act cases can be barred on possible jurisdiction grounds if claims are "publicly disclosed" in a prior hearing, 3730(e)(4)(b). (United States ex rel. Jones v. Horizon Healthcare Corp., 160 F.3d 326 (6th Cir. 1998)
5. The filing of the case under seal and keeping the case under seal is prejudicial to the False Claims Act plaintiff as he is barred from taking any action while it is under seal.

Federal District court authority protects a relator from divulging any discovery that will be used in a False Claims Act case in any other forum.

United States ex rel. Bagley v. TRW, 2003 U.S. Dist. LEXIS 6101.

6. State Court plaintiffs are seeking to force Relator in the Federal False Claims Act case to engage in discovery in the state case which he has not done. Forcing the Relator to engage in discovery in another forum other than the Federal court is exactly what congress sought to prevent in enacting Federal jurisdiction of cases that arise from the same facts or occurrence. (31 U.S.C. 3732 (b)). This statutory construction would have little effect if it did not set out to protect the federal jurisdiction.

7. The ills of parallel federal and state litigation on the same facts and occurrence were well thought out and recognized when Congress enacted the False Claims Act in 1863 and had

amended it most recently in 1986 governing federal jurisdiction on False Claims Act cases.

8. These statutory guidelines are well founded and are different than discovery orders in the same state court venue because these jurisdictional bars that are part of the False Claims Act statute could defeat the whole case in federal court, not so with an order pertaining to the state discovery orders.

9. Judicial economy is wasted by the state court case, uneven application of the federal venue regarding the False Claims Act, and denial of a meaningful federal venue unfettered by state jurisdiction.

10. State court cannot order the same relief as it is not a False Claims Act action filed in state court nor could it have been. All False Claims Act cases must be filed in the U.S. District Court

and served only on the Attorney General and The U.S Attorney, serving any other party is grounds for terminating the case on jurisdictional grounds. (31 U.S.C. §3730 (b)(2))

11. If a first to file rule has precedent over the clear statutory provision spelling out federal jurisdiction in all False Claims Act cases involving the same facts or occurrence, then it could be no simpler to completely defeat a potential False Claims Act Action by simply beating the Relator to the court house and filing a state court action, all the while knowing that the Relator's case must stay sealed for the statutory 60 days (or longer upon a showing of good cause by the Attorney General) and thereby eliminating a removal within the customary 30 days upon receiving the complaint. (31 U.S.C. § 3730(b).(1).(2).(4))

12. While these arguments look to show the necessity of the Complete Pre-emption doctrine controlling federal jurisdiction it also shows how this question qualifies under that small class of orders that are completely separate from the merits of the case, too important to wait until final adjudication, and are essentially unreviewable at the end of trial. All of the statutory and jurisdictional bar that are in place under the False Claims Act make this clear.

The Supreme Court ruled in Brotherhood:

Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other words, our

jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the Brotherhood's right to intervene in the proceeding brought under § 16 (12) of the Interstate Commerce Act.

We start with Rule 24 (a) and (b) of the Federal Rules of Civil Procedure, applicable to a civil proceeding of this type. Rule 24 (a) deals with intervention of right and provides in pertinent part: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . . ." In contrast, Rule 24 (b) is concerned with permissive intervention and reads as follows: "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The Brotherhood claims that as a consequence of either of two federal statutes -- § 17 (11) of the Interstate Commerce Act or 28 U. S. C. § 45a -- it has an absolute right to intervene within the meaning of Rule 24 (a) (1). It also alleges that it

possesses an absolute right within the contemplation of Rule 24 (a) (2), the representation of its interest by existing parties being inadequate and the possibility that it may be bound by a judgment in the action being a real one. No claim to permissive intervention under Rule 24 (b) is made; nor is there a contention that the District Court abused any discretion it might have had.

In our view, § 17 (11) of the Interstate Commerce Act does give the Brotherhood an absolute right to intervene in the instant proceeding within the meaning of Rule 24 (a) (1). As set forth in 54 Stat. 916, n6 this portion of the Act reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this Act affecting such employees." The following considerations make obvious the fact that the Brotherhood meets all the requirements of this provision:

n6 As it appears in the United States Code, 49 U. S. C. § 17 (11), this paragraph reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."
The words "this chapter" refer to Part I of the Interstate Commerce Act, which embodies the original statute known by that name prior to its division into parts. Chapter 8 relates to Part II of

the Interstate Commerce Act, originally known as the Motor Carrier Act of 1935. Section 305 (h) of Part II is a cross-reference to § 17 of Part I: "All the provisions of section 17 of this title shall apply to all proceedings under this chapter." Chapter 12 is the equivalent of Part III of theInterstate Commerce Act, which deals with water carriers. Section 916 (a) is also a cross-reference to § 17 of Part I: 'The provisions of section 12 and section 17 of chapter 1 of this title and sections 46-48 of this title shall apply with full force and effect in the administration and enforcement of this chapter." (Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

In the case at issue, it is unquestioned that Bruce Darian is the duly designated relator to the United States, in the case of *Brotherhood,* it is unquestioned that Brotherhood is the duly designated representative of the River Road trainmen.

> *"First. It is unquestioned that the Brotherhood is the duly designated representative of the River Road trainmen."*
>
> *(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)*

As Relator under the False Claims Act, the relator is granted an absolute right to federal jurisdiction for both federal and state claims.

> *"31 U.S.C. 3732(b) Claims under state law. The district court shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730."*

The Supreme Court rejected the appellee railroad's contention to confine this meaning only to any proceeding before the Interstate Commerce Commission and to the exclusion of court proceedings.

> *Second. The right of intervention granted to such a representative by § 17 (11) applies to a court proceeding under § 16 (12) of the Act, the plain language of § 17 (11) extending its reach to "any proceeding arising under this Act."*

On this point, however, the appellee railroads contend that § 17 (11) must be confined to proceedings before the Interstate Commerce Commission, to the exclusion of court proceedings. In support of this contention, they point to the fact that § 17 as a whole is primarily concerned with Commission procedure and organization. That fact is emphasized by the heading of § 17 as it appears in the Statutes at Large, 54 Stat. 913, and the United States Code, 49 U. S. C. § 17, a heading that reads: "Commission procedure; delegation of duties; rehearings." The inference is then made that paragraph (11), with which we are concerned, must be limited by that heading and by the general context of § 17 as a whole. The result of the contention is that the phrase "any proceeding arising under this Act, " as found in paragraph (11). is rewritten by construction to refer only to "any proceeding before the Commission arising under this section."

We cannot sanction such a construction of these words. It is true, of course, that § 17 is concerned primarily with the organization of the Commission and its subdivisions and with the administrative disposition of matters coming within that agency's jurisdiction. At least ten of the twelve paragraphs of § 17 deal with those

matters. And before § 17 was cast into its present form in 1940, all five of its paragraphs related exclusively to those matters. Congress rewrote the section when it enacted the Transportation Act of 1940, 54 Stat. 898, continuing and modifying previous provisions and consolidating and including matters which had formerly been scattered throughout the Act. n7 At the same time, however, it was expressly recognized that certain paragraphs were being added which were entirely new, paragraphs which went beyond purely administrative matters. Thus the pertinent committee reports stated n8 that "A new paragraph (9) is included providing that orders of a division, an individual Commissioner, or a board shall be subject to judicial review as in the case of full Commission orders, after an application for rehearing has been made and acted upon." And as to paragraph (11), it was said n9 that "A new paragraph is added at the end of section 17 providing that representatives of employees of a carrier may intervene and be heard in any proceedings arising under part I affecting such employees." By such language in their reports, the framers of § 17 recognized the obvious fact that certain provisions of that section

deal with something more than might be indicated by the heading.

(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

n7 H. Rep. No. 1217, 76th Cong., 1st Sess., p. 13; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

n8 H. R. No. 2016, 76th Cong., 3d Sess., p. 67; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

n9 H. Rep. No. 1217, 76th Cong., 1st Sess., p. 15.

The framers of the False Claims Act used language that creates jurisdiction for both federal and state claims in the U.S. District Court. It would be unjustified for the Court to limit this plain language conferring jurisdiction.

"Nor do we perceive any reason of statutory policy why the framers of § 17 (11) should have wished to confine the right of intervention by employee representatives to proceedings before the Commission. Occasions may arise, as in this case, where the

employee representatives have no interest in intervening in the original administrative proceeding, but where they have a very definite interest in intervening in a subsequent judicial proceeding arising under the Act. When the framers have used language which covers both types of proceedings,] we would be unjustified in formulating some policy which they did not see fit to express to limit that language in any way."

(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

As in the case of Brotherhood creating an absolute right to intervene from the statutory language *"may intervene and be heard"* is the same as "Any action under section 3730 may be brought in any judicial district."

"Since all the conditions of § 17 (11) have been satisfied in this case, the only question that remains is whether the Brotherhood is thereby accorded a permissive or an absolute right to intervene. The language of § 17 (11) is in terms of "may intervene and be heard," which might be construed as giving only a discretionary right. But

our view, as we have indicated, is that once the requirements of § 17 (11) have been met, the employees' representative acquires an absolute right of intervention."

(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

Relator urges the Court that the term "may intervene" and "any action may be brought" have the same purpose and meaning. The absolute right to intervene in a court to protect the rights of those they are representing is no different than a Relator having the absolute right to protect his rights as a Relator and the rights of the United States government. This important jurisdictional issue cannot be left to the discretion of the court and would give rise to an uneven application of the False Claims Act.

"The statutory term "may intervene" thus means "may intervene if the employees' representative so chooses" rather than "may intervene in the

discretion of the court." And if the representative does choose to intervene, it may do so as a matter of right within the meaning of Rule 24 (a) (1) of the Federal Rules of Civil Procedure. Such is this case.

We thus conclude that § 17 (11) gives the Brotherhood an absolute right to intervene in this proceeding, making it unnecessary to discuss whether, and to what extent, the Brotherhood would have had such a right apart from § 17 (11). It follows that we have jurisdiction to consider the appeal on its merits. And in the exercise of that jurisdiction, we reverse the judgment of the District Court denying leave to the Brotherhood to intervene.

(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

31 USC 3729-3733 CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicia district in which the

defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

Claims under state law. The district court shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

XV

ARGUMENT 5

RELATOR'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BY RULING WITHOUT HEARINGS

1. The Court created a pattern of setting motions for hearing and then removing those hearings from the calendar just before the hearing date.
2. The Court prejudiced Relator's case by continuing to rule in chambers without oral argument on the several issues that were important to be argued before the court.
3. The Statute under the FCA clearly requires oral argument on any Motion to Dismiss a FCA action to be provided to the Relator.

4. The Court relied on Local Rules over the Federal Statute which requires oral hearing on a Motion to Dismiss.

5. Relator repeatedly objected to the Court denying hearings and made a showing that Relator was prejudiced by being denied oral hearings.

6. The Court held from the beginning that there was never going to be a hearing on any Motion throughout the entire case.

[**1861] If a relator initiates the FCA action, he must deliver a copy of the complaint, and any supporting evidence, to the Government, § 3730(b)(2), which then has 60 days to

intervene in the action, §§ 3730(b)(2), (4). If it does so, it assumes primary responsibility for prosecuting the action, § 3730(c)(1), though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement, § 3730(c)(2).

XVI

ARGUMENT 6

THE GOVERNMENT HAS NO CLAIM WITHOUT RELATOR'S CONTINUING RIGHT TO PROSECUTE HIS CLAIMS

The Court's Order separating the Government from Relator and allowing the Government's claims to stand is clear error of the False Claims Act Qui Tam action. The Government would not have

a case if it was not for the fact that the whistleblower has come forward under the Qui Tam provisions to provide the Government with all of the information. The standing to prosecute is granted upon the filing of the suit and cannot be revoked by the Court. Vermont v. Stevens

XVII

ARGUMENT 7

PLAINTIFF PRESENTED TRIABLE ISSUES TO THE COURT WHICH SHOULD HAVE PRECLUDED GRANTING SUMMARY JUDGEMENT FOR THE DEFENDANT'S ON THE RICO CLAIMS.

The Court clearly abused it's discretion in granting the remaining moving parties Motion for Summary Judgement without oral argument when it was requested by affidavit, denied accepting Relator's genuine issues of material fact which were affixed to and a part of the Opposition for Summary Judgement. Additionally the court only

recognized a three or four month pattern of racketeering activity when in fact it was shown to be well past over a year which clearly surpasses the required two predicate acts within a ten year period under the law.

XVIII

ARGUMENT 8

THE COURT ABUSED IT'S DESCRESSION IN NOT GRANTING AN EXTENSION OF TIME.

The Ninth Circuit panel held that Appellant's Qui Tam case is dismissed for lack of prosecution. The only opposition to Appellant's motion for an extension was from a non party to the appeal without standing to intervene. No motion from the amicus party was filed nor was permission by the Court granted to file the brief. The filed opposition should be held invalid, Appellant's motion

considered unopposed and reset the briefing schedule to this appeal.

1) overlooked the fact that Appellant Relator is under doctors care with a medical condition which has caused a considerable reduction in the ability to prosecute the case and needed the extra time to finish drafting Appellant's Opening Brief.

2) Furthermore, the Panel's Order does not consider that ***the only filed opposition came from a non party to the appeal***. Additionally, not only was there no standing to file the opposition, the party did not notify Appellant that they would file an opposition to the further request for an extension due to medical reasons which were disclosed to the Court under seal. The panel held that Appellant's Qui Tam case is dismissed for lack of prosecution. The only opposition to Appellant's

motion for an extension was from a non party to the appeal without standing to intervene. No motion from the amicus party was filed nor was permission by the Court granted to file the brief. The filed opposition should be held invalid, Appellant's motion considered unopposed and reset the briefing schedule to this appeal.

Darian seeks review for both of these issues. In the judgement of Appellant who is pro per, review is required because the Panel's Order: 1) overlooked the fact that Appellant Relator is under doctors care with a medical condition which has caused a considerable reduction in the ability to prosecute the case and needed the extra time to finish drafting Appellant's Opening Brief.
2) Furthermore, the Panel's Order does not consider that *the only filed opposition came from a non party to the appeal.*

Additionally, not only was there no standing to file the opposition, the party did not notify Appellant that they would file an opposition to the further request for an extension due to medical reasons which were disclosed to the Court under seal.

XIX

STANDARD OF REVIEW

Argument Number 1

Relator is a person who is expressly authorized to bring suit on his own behalf and on behalf of the Government

We review de novo the purely legal question whether a statute is constitutional. *Gray v. First Winthrop Corp., 989 F.2d 1564, 1567 (9th Cir. 1993).* We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." *Mistretta v. United States, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647*

(1989) [**11] (quoting *Bowsher v. Synar, 478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986)* (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. *Communications Workers of America v. Beck, 487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988)*. Our adherence to this principle of presumptive constitutionality is guided by our understanding that "when we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.'" *Fullilove v. Klutznick, 448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)* (citation omitted). See U.S. ex rel. Kelly v. Boeing 9 F .3d 743 at 757 (9th Cir. 1993)

Argument Number 2

The State is a person under the False Claims Act;

Argument Number 3

Relator is broadly protected as a Whistleblower, both under the False Claims Act and under the Federal Water Pollution Control Act (Clean Water Act)

Argument Number 4

The FCA has original jurisdiction over all claims, both federal and state and pre-empts all other actions.

The Court reviews matters regarding subject matter jurisdiction de novo. Similarly, the Court reviews the district court's determination of complete preemption de novo *See Botsford v. Blue Cross 314 F.3d 390,393 U.S. 2002 U.S. App. LEXIS 26457; citing Delta Savings Bank v. United*

States, 265 F.3d 1017, 1024 (9th Cir. 2001), cert. Denied, 122 S. Ct. 816, 534 U.S. 1082, 151 L. Ed. 2d 700 (2002), Roach v. Mail Handlers Benefit Plan, CAN, 298 F.3d 847, 849 (9th Cir. 2002).

Argument Number 5

Reviewed de novo

Relator's constitutional right to due process was violated by ruling without hearings.

Argument Number 6

The Government has no claim without Relator's continuing right to prosecute his claims.

Argument Number 7

Plaintiff presented triable issues to the Court which should have precluded granting Summary Judgment for the remaining Defendant's on the RICO claims..

Argument Number 8

XX

CONCLUSION

The trial court's dismissing Relator/Appellant's FCA action against these Defendant's and others because Relator is not a lawyer is an abuse of discretion. The Court holding that the state judge must approve a FCA action was also an abuse of discretion. The court erred in holding that the Federal court cannot adjudicate all claims whether federal or state under the False Claims Act. The state court judge was in clear absence of all jurisdiction in ruling that permission must first be granted before suing the receiver under the FCA. Appellant respectfully requests the court reverse the District Courts interlocutory order for lack of

jurisdiction and remand for further proceedings based on Relator's right to sue under the FCA

Bruce Darian as Relator under the False Claims Act urges the Court to hear the case on the merits and grant review. Congress has recognized the importance and the rarity of obtaining information from whistleblowers which leads to the recovery of money lost from the government due to fraud. Relator has endured a long and hard fought battle spanning over eight years in this case alone.

For the foregoing reasons it is respectfully requested that the Courts ruling be vacated the Mandate recalled and the briefing schedule reset.

"Let us have faith that right makes might"

--Abraham Lincoln

DATED: August 27, 2009

Respectfully Submitted By:

BRUCE H. DARIAN, Pro Per
P.O. Box 42
Hollywood, CA 90078

By Bruce H. Darian
United States of America
ex rel. Darian

XXI

STATEMENT OF RELATED CASES

Appellant certifies that there is a known related Ninth Circuit case 06-55692.

Supreme Court, U.S.
FILED

09-405 APR 20 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

Docket No.

In The

Supreme Court of the United States

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendant-Respondents.

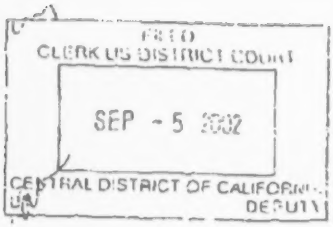
On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

APPENDIX

Bruce H. Darian
P.O. Box 42
Hollywood, CA 90028
Tel. 310-428-8131
Fax 310-374-0134
In Pro Se

Appendix

		Pages
1.	Order Granting Moving Defendant's Motion to Dismiss	2-21
2.	Order Dismissing with Prejudice	22-32
3.	Order Granting Defendants' Motions for Summary Judgment	33-64
4.	Ninth Circuit Order	65-66
5.	Letter from Colin Stokol M.D.	67-68



UNITED STATES DISTRICT COURT
CENTRAL

DISTRICT OF CALIFORNIA

BRUCE DARIAN, individually doing business as DARIAN CONSTRUCTION CO.,	]	CV 00-10255 FMC (JWJx)
Plaintiff,	]	ORDER GRANTING MOVING DEFENDANTS' MOTION TO DISMISS
vs.	]	
ACCENT BUILDERS, INC., et al.,	]	
Defendants.	]	

This matter is before the Court on the Motion to dismiss (Docket #258) or, in the alternative. for a more definite statement, pursuant

344

to Fed. R. Civ. Proc. 8, 12(b)(l) and (6), and 12(e), brought by Moving Defendants State of California (sued as its agencies, Cal Osha, Department of Parks and Recreation, Department of General Services, Contractors State License Board, California Regional Quality Control Board, California Regional Water Quality Control Board and Judicial Counsel of California); and the following state employees, all sued in their official capacities: Rene Garcia, Rusty Areais, Tim La Franchi, Tara Todd, Douglass Wick, Tom Carver, Gary Stephens, Richard Barton, Reginald Demery, Dave Pettway, Ian Gavine, Michael Brown, Pam Albertini, Marianne Henkel, Gloria Langley, Janeece Hards, Bill Siener, Hon. Patricia Collins, Hon. Lawrence Mira and Hon. Terri Adamson.

For the reasons set forth below, the Court hereby GRANTS Moving Defendants' Motion.

I. Background

On December 12, 2001, this Court dismissed without prejudice Plaintiff's First Amended Complaint ("FAC") for its failure to comply with Rule 8(e)(1)'s requirement that "each averment of a pleading shall be simple, concise, and direct." In particular, the Court found that the FAC, which named more than 50 defendants and asserted each of its 54 causes of action against all 50 defendants, was rambling and made it impossible to determine which causes of action were asserted against which defendants. As a result, it was impossible for defendants to frame reasonable responses and mount effective defenses. *See McHenry v. Renne*, 84 F.3d 1172,1179-80 (9th Cir. 1996) ("Something

labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness, and clarity as to whom Plaintiff's are suing for what wrongs, fails to perform the essential functions of a complaint.").

On January 30, 2002, Plaintiff filed his Second Amended Complaint ("SAC"), which names more than 80 individual and corporate defendants and alleges 41 causes of action. On February 15, 2002, the instant Motion to dismiss was filed by the Moving Defendants.

II. Discussion

A. Moving Defendants' Motion to dismiss under Rule 8(e) and Motion for a More Definite Statement under Rule 12(e)

Rule 8(e)(l) provides that "Each averment of a pleading shall be simple, concise and direct." *See*

Fed. R. Civ. Proc. 8. Failure to comply with Rule 8(e) provides a basis for dismissal.

In considering a Rule 12(e) motion for a more definite statement, the Court must be mindful of the liberal pleading requirements of Federal Rule of Civil Procedure 8(a), pursuant to which a short and plain statement of the claim will suffice. *Betancourt v. Marine Cargo Management, Inc.*, 930 F.Supp. 606, 608 (S.D.Fla. 1996). Because these liberal pleading requirements are offset by broad discovery rights, a motion for more definite statement should not be granted unless the complaint is so vague or ambiguous that the opposing party cannot frame a responsive pleading. *Famolare et al. v. SCOA Industries*, 525 F.Supp. 940, 949 (E.D.Cal. 1981). Discovery is not the purpose of Rule 12(e). *Id.*

Moving Defendants claim that despite Plaintiff's efforts to improve upon his FAC, his Second Amended Complaints continues to run afoul of Rule 8(e)'s requirement that pleadings be "simple, concise, and direct." First, counsel for the Moving Defendants claims that it is virtually impossible to determine which causes of action are asserted against which defendants. This claim is mistaken; the Complaint clearly and unambiguously lists precisely which defendants are being charged under each cause of action. Accordingly, defendants are placed on clear notice of which claims they must defend.

Second, counsel for the Moving Defendant contends that it is virtually impossible to determine what conduct of defendants is alleged by plaintiff to have violated the various statutory provisions

which are pleaded. Again, this contention is mistaken. The SAC, starting at ¶94 and continuing until ¶491, spells out in detail Plaintiff's specific allegations against each defendant. Those allegations are made in an orderly fashion. For example, all of the allegations against defendant Halco Electric are contained in ¶¶297 through 306, all allegations against defendant Bookout Plumbing are then made in ¶¶307 through 320, all allegations against defendant L.A. County District Attorney are made in ¶¶321 through 334, and so on. Then, under each cause of action Plaintiff merely states the statutory language giving rise to each claim (e.g., ¶500 lists the statutory text of 18 U.S.C. §1342) and then lists each of the defendants whom he is charging under that cause of action. Plaintiff specifically incorporates his previous

allegations (including ¶¶94 through 491) into each cause of action. When, for example, defendant Halco Electric is charged with violating federal mail fraud law under 18 U.S.C. §1342, Halco must refer back to the specific allegations made against it in ¶¶297 through 306 to determine the factual basis for Plaintiff's mail fraud claim against it. Moving Defendants' contention that Plaintiff's pleading approach is insufficiently specific is without merit. To the contrary, Moving Defendants' apparent suggestion, that Plaintiff restate under each cause of action his specific allegations against each defendant, would transform an already tome-like pleading into a veritable encyclopedia-length document. Such an approach is undesirable and unnecessary, for the Complaint already puts defendants on clear notice of the allegations and

claims against them and therefore satisfies the Federal Rules of Civil Procedure's liberal "notice pleading" standards.

Moving Defendants' Motion to dismiss under Rule 8 and Motion for a more definite statement under Rule 12(e) are denied.

B. Previously dismissed cause of action

As discussed previously in various Court Orders regarding other Defendants' Motions to dismiss, the 2nd, 5th, 6th, 7lh, 9th, 12th through 28th, and 30th through 40lh causes of action are dismissed as against all Defendants, including Moving Defendants. *See e.g. Halco Electric Order; Malibu Defendants' Order; Lambertson Order.*

C. Moving Defendants' Motion to dismiss remaining claims based on Eleventh Amendment Sovereign Immunity

1. State of California and its agencies

The Eleventh Amendment to the U.S. Constitution provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State." Courts have interpreted the Eleventh Amendment as barring a federal court from hearing claims by individuals against a State, unless the State consents to suit or Congress has expressly abrogated the State's immunity pursuant to Section 5 of the Fourteenth Amendment. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Florida Prepaid Postsecondary Education Expense Fund v. College Savings Bank*, 527 U.S. 627 (1999).

Eleventh Amendment immunity bars suits not only against the States themselves, but also against the States' agencies. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) ("It has long been settled that the [Eleventh Amendment's] reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and instrumentalities.") In order to invoke Eleventh Amendment immunity, an entity must be an "arm" of the State. *See State of California v. Campbell* 138 F.3d 784, 786 (9th Cir. 1998); *see also California Government Code §900.6* (" 'State' means the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by

warrants drawn by the Controller."). Cal Osha, the Department of Parks and Recreation, the Department of General Services, the Contractors State License Board, the California Regional Quality Control Board, the California Regional Water Quality Control Board and the Judicial Counsel of California are certainly arms of the State of California.

Plaintiff has failed to demonstrate that the State of California and its agencies have consented to suit in the instant action. Moreover, Plaintiff has failed to demonstrate that Congress expressly abrogated the States' sovereign immunity in enacting any of the federal statutes under which Plaintiff has brought suit.[1] Finally, the Eleventh

---

[1] In addition, a State and its agencies are not considered "persons" subject to suit under section 1983, see

Amendment bars federal courts from considering any purely state law claims against a state, state agency, or state official acting in his or her official capacity. *See Pennhurst State Sch. and Hosp. v.*

Will v. Michigan Dep't of State of Police, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983"), or under the False Claims Act, see *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 J.S. 765, 787-88, 120 S.Ct. 1858, 1870 (2000) ("In sum, we believe that various features of the CA, both as originally enacted and as amended, far from providing the requisite affirmative indications that the term "person" included States for purposes of qui tam liability, indicate quite the contrary.... the False Claims Act does not subject a State (or state agency) to liability in [False Claims Act] actions"). Finally, Eleventh Amendment immunity applies to claims brought against a state under the Clean Water Act. See *Natural Resources Defense Council v. California Dept. of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996).

Halderman, 465 U.S. 89,106,104 S.Ct. 900 (1984); *Gamboa v. Rubin*, 101 F.3d 90, 91-92 (9th Cir. 1996) (Eleventh Amendment generally bars suits against state governments in federal court based on violations of state law).

Therefore, Plaintiff's claims against the State of California and its agencies are barred and are hereby dismissed with prejudice.

2. State employees sued in their official capacities

Because the State of California and its agencies enjoy immunity from Plaintiff's claims, co-Defendants Rene Garcia, Rusty Areais, Tim La Franchi, Tara Todd, Douglass Wick, Tom Carver, Gary Stephens, Richard Barton, Reginald Demery, Dave Petrway, Ian Gavine, Michael Brown, Pam Albertini, Marianne Henkel, Gloria Langley,

Janeece Hards, and Bill Siener are also immune under the Eleventh Amendment. Plaintiff has sued those individuals in their official capacities for retrospective relief. Therefore, to the extent that the State and its agencies enjoy sovereign immunity under the Eleventh Amendment, the agencies' officials will be afforded similar protection. *See Witt v. Michigan Dep't of State of Police*, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.") (internal citations omitted).

Although a plaintiff may sue state officials in their official capacities to enjoin future violations of federal law, *see Ex Parte Young*, 209 U.S. 123,159-

60, 28 S.CL 441 (1908), Plaintiff's Complaint does not seek such relief from the named state officials.[2] Moreover, state law claims brought against state officials acting in their official capacity are barred by the Eleventh Amendment, even if only prospective injunctive relief is sought. There is no ex Parte Young exception for state Jaw claims. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89,106,120-22 (1984); Pena v. Gardner, 976 R2d 469,473 (9th Cir. 1992); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261,290,117

---

[2] Although Plaintiff contends in his Opposition that he seeks injunctive relief pertaining to alleged pollution, it is clear from his allegations that the alleged polluting acts or omissions are completed. *See e.g. Opposition* at 16-18. He does not contend that the State agencies are committing any ongoing violations of the Clean Water Act that could merit prospective, injunctive relief pursuant to *Ex Parte Young*.

S.Ct. 2028, 2044 (J. O'Connor, concurring) (citing *Pennhurst* for the proposition that "plaintiff cannot invoke Young doctrine based solely on alleged violation of state law.").

Plaintiff's claims against state officials Rene Garcia, Rusty Arcais, Tim La Franchi, Tara Todd, Douglass Wick, Tom Carver, Gary Stephens, Richard Barton, Reginald Demery, Dave Pettway, Ian Gavine, Michael Brown, Pam Albertini, Marianne Henkel, Gloria Langley, Janeece Hards, and Bill Siener in their official capacities are hereby dismissed without prejudice.

Finally, Plaintiff's claims against the Hon. Patricia Collins, the Hon. Lawrence Mira, and the Hon. Terri Adamson are hereby dismissed with prejudice, as those three Defendants enjoy absolute immunity for any actions taken in their judicial

capacity. *See Mireles v. Waco*, 502 U.S. 9, 12, 112 S.Ct. 286, 288 (1991); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Because Plaintiff's claims against those three are based on their prior judicial decisions in cases in which Plaintiff was a party, Plaintiff's claims against them are dismissed with prejudice.[3]

---

[3] Plaintiff alleges in his Opposition that Judges Collins and Adamson are not entitled to judicial immunity because their judicial actions were predetermined as they had conspired with prosecutors and with receiver David Pasternak. In support of this allegation, however, Plaintiff cites to *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), which was directly overruled by the Ninth Circuit in *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) ("We therefore hold that a conspiracy between judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges and prosecutors. As long is the judge's ultimate acts are judicial actions taken within the court's

III. Conclusion

The Court hereby GRANTS Moving Defendants' Motion to dismiss (Docket #258). All of Plaintiff s claims against the State of California and its agencies are dismissed with prejudice. All of Plaintiff's claims against Judges Collins, Mira, and Admanson are dismissed with prejudice. As against the state officials Rene Garcia, Rusty Areais, Tim La Franchi, Tara Todd, Douglass Wick, Tom Carver, Gary Stephens, Richard Barton, Reginald Demery, Dave Pettway, Ian Gavine, Michael Brown, Pam Albertini, Marianne Henkel, Gloria

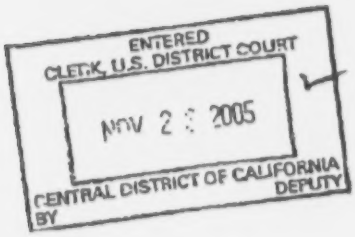
---

subject matter jurisdiction, immunity applies... To the extent that Rankin and Beard are to the contrary, they are overruled "); See also *Moore v. Brewster*, 96 F.3d 1240, 1244 (9th Cir. 1996) (stating "Nor is judicial immunity lost by allegations that a judge conspired with one party to rule against another party" and citing to *Ashelman*).

Langley, Janeece Hards, and Bill Siener, all sued in their official capacities, the following causes of action are dismissed with prejudice: 2,5,6,7,9,12 through 28, and 30 through 41; and the following causes of action are dismissed without prejudice: 1,3,4,8,10, and 11. If Plaintiff chooses to replead those causes of action which have been dismissed without prejudice he must do so within 30 days of the Date of this Order. Otherwise, Defendants are to Answer the Second Amended Complaint within 20 days after the expiration of the deadline to amend the Complaint.

IT IS SO ORDERED.

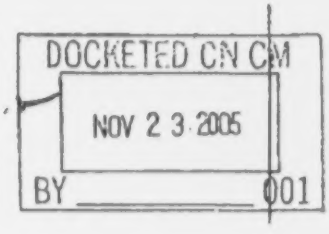
September 4, 2002 /s/
FLORENCE-MARIE COOPER
JUDGE UNITED STATES
DISTRICT COURT



UNITED STATES DISTRICT COURT
CENTRAL

DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel, BRUCE DARIAN, individually doing business as DARIAN CONSTRUCTION CO.,	CV 00-10255 FMC (JWJx)
Plaintiff,	ORDER DISMISSING WITH PREJUDICE
vs.	
ACCENT BUILDERS, INC., et al.,	
Defendants.	



For the reasons and in the manner set forth below, the Court hereby finalizes the disposition of the following claims against the following parties.

622

I. Procedural Background

The parties are familiar with the factual and procedural history of this case, and both are detailed in many of the Court's previous orders.

On January 7, 2005, the Court issued multiple orders in connection with this lawsuit. Each order addressed the dismissal of a variety of Plaintiff's claims against the various defendants in this case. Some claims were dismissed with prejudice, and some were dismissed without prejudice. In two of the January 7, 2005 orders (discussed below), the Court denied the moving defendants' motions to dismiss a particular cause of action against them. Each of the Court's January 7, 2005 orders required Plaintiff to file a Fourth Amended Complaint within 60 days of the date of the order. Additionally, Plaintiff was advised that

he would have to retain counsel to pursue the Qui Tarn portion of his litigation.

In August 2005, the Court denied various defendants' Motions to Dismiss for Failure to Comply with Court Order because the 60-day limit to file a Fourth Amended Complaint was tolled during the months of February through July, while Plaintiff's appeal to the Ninth Circuit was pending. Plaintiff's appeal was dismissed by the Ninth Circuit in late July 2005. Therefore, as of August 5, 2005, Plaintiff still had approximately 19 days to file an amended complaint.

II. Discussion and Conclusion

The Court gave Plaintiff specific guidelines to meet in filing a Fourth Amended Complaint, and Plaintiff failed to comply with those guidelines. He did not file and serve a Fourth Amended Complaint

within the allotted 60 days, i.e. by August 24, 2005. A review of the docket confirms that all claims against certain defendants are dismissed with prejudice due to Plaintiff's failure to comply with the Court's January 7, 2005 orders. Accordingly, the Court dismisses Plaintiff's Third Amended Complaint with prejudice to the defendants listed below.[4]

Pursuant to the Court's orders dated January 6, 2005[5]:

Pam Albertini

Rusty Areais

Darlene Atkinson

---

[4] Appendix A, attached to this Order, provides a alphabetical list of all defendants listed below.

[5] These orders was filed January 7, 2005, and they were docketed on January 11, 2005.

Richard Barton

Bookout Plumbing, Inc.

Harold Bookouts

Michael Brown

California Regional Water Quality Control Board

Tom Carver

James Colbaugh

Reginald Demery

Susan Gannuscio

Rene Garcia

Ian Gavine

Janeece Hards

Marianne Henkel

Christi Hogins

International Hardwoods Inc.

Judicial Council of California

Tim La Franchi

Lamberson Koster and Company

Las Virgenes Municipal Water District

Los Angeles County, Sanitation District No. 2

Gloria Langley

Wayne K. Lemieux

Malibu, City of

Pepperdine University

Dave Pettway

Phil E. Phillips

Don Robinson, doing business as Arrow Security

Bill Siener

Gary Stephens

Tara Todd

Douglass Wick

Don Wippert

Pursuant to the Court's January 12, 2005 Order:

Gray Davis

Bill Lockyer

The Court's September 22, 2005 Order Denying as Moot Defendants' Motions for Involuntary Dismissal confirmed the dismissal, with prejudice, of Plaintiff's Third Amended Complaint as to the following defendants:

Le Roy Baca

Thorn Bradstock

Heath Carrs

DCA Drilling and Construction Inc.

Fibrwrap Construction Co.

Fyfe Company

Ed Fyfe

Halco Service Corp.

Martin L. Herscowitz

Allyson Kimmel

Los Angeles County (erroneously named as "Office of the Los Angeles County District Attorney" and Los Angeles County Sheriff's Department)

Ernesto Massone

Pat May

Marna Miller

John O'Brien

Harold Orums

Ken Patrick

Mike Wilson

Pursuant to the Court's November 10, 2005 Order:

Malibu Bay Company

A. Jerold Perenchio.

IT IS SO ORDERED.[6]

November 22, 2005 ____/s/_____
FLORENCE-MARIE COOPER
JUDGE UNITED STATES
DISTRICT COURT

---

[3] Accordingly, the following are the only remaining causes of action in this lawsuit: (1) Plaintiffs' eighth cause of action against Defendants Anthony Lawrence Federico and Ronald Ray Federico ("Federico Defendants"), and (2) Plaintiffs' eighth cause of action against Defendants Accent Builders Inc., Superior Gunite, Robert G. Kelly, National Union Fire Insurance, and American International Group

APPENDIX A
To
November 22, 2004 Order Dismissing with Prejudice

Pam Albertini
Rusty Areais
Darlene Atkinson
Le Roy Baca
Richard Barton
Bookout Plumbing, Inc.
Harold Bookouts
Thorn Bradstock
Michael Brown
California Regional Water Quality Control Board
Heath Carrs
Tom Carver
James Colbaugh
DCA Drilling and Construction Inc.
Gray Davis
Reginald Demery
Fibrwrap Construction Co.
Fyfe Company
Ed Fyfe
Susan Gannuscio
Rene Garcia
Ian Gavine
Halco Service Corp.
Janeece Hards
Marianne Henkel
Martin L. Herscowitz
Christi Hogins
International Hardwoods Inc.
Judicial Council of California
Allyson Kimmel
Tim La Franchi
Lamberson Koster and Company
Las Virgenes Municipal Water District
Gloria Langley
Wayne K. Lemieux
Bill Lockyer
Los Angeles County (erroneously named as "Office of the Los Angeles County District Attorney" and "Los Angeles County Sheriff's Department")
Los Angeles County, Sanitation District No. 2
Malibu, City of
Ernesto Massone

Pat May
Marna Miller
John O'Brien
Harold Omms
Ken Patrick
Pepperdine University
Dave Pettway
Phil E. Phillips
Don Robinson, dba
Arrow Security
Bill Siener
Gary Stephens
Tara Todd
Douglass Wick
Mike Wilson
Don Wippert

___ Priority
___ Send
___ Clsd
___ Enter
___ JS-5/JS-6
___ JS-2/JS-3

FILED
CLERK, U.S. DISTRICT COURT
JUN 21 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL

DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel., DARIAN,	]	CV 00-10255 FMC (JWJx)
Plaintiff,	]	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
vs.	]	
ACCENT BUILDERS, INC., et al.,	]	
Defendants.	]	

ENTERED
CLERK, U.S. DISTRICT COURT
JUN 22 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

This matter is before the Court on

Defendants Accent Builders, Inc., Superior Gunite,

(749)

American International Group, Robert G. Kelly, and National Union Fire Insurance Company of Pittsburgh's Motion for Summary Judgment and/or Summary Adjudication of Claims (docket no. 693), and Defendants Anthony Federico and Ronald Federico's Motion for Summary Judgment and/or Partial Summary Judgment and/or Summary Adjudication of Claims (docket no. 698), filed January 3 and 8, 2007, respectively. The Court has read and considered the moving, opposition, and reply documents submitted in connection with these motions. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons and in the manner set forth below, the Court hereby GRANTS Defendants' Motions.

EVIDENTIARY OBJECTIONS

Plaintiff Bruce Darian objects to the Defendants' characterization of his responses to the interrogatories Accent Builders, Inc. propounded. The Court will consider the content of Plaintiff s responses, in their entirety and in context, and will not limit its inquiry to Defendants' summary of those responses. The Plaintiff is admonished, however, that he has not made a valid evidentiary objection under the Federal Rules of Evidence. The Court overrules plaintiff's "Objection to Evidence" (docket no. 731) because it does not contest the admissibility of any piece of evidence.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 30, 2002, pro se Plaintiff Bruce Darian filed a 394-page Third Amended Complaint (TAC) that alleged the following causes of action: (1) violation of the False Claims Act under 31 U.S.C. § 3729; (2) civil rights violations under 42 U.S.C. §§ 1983 and 1985; (3) conspiracy to defraud; (4) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C. § 1961 and conspiracy to violate RICO under 18 U.S.C. § 1968; (5) violation of the Federal Water Pollution Control Act under 33 U.S.C. § 1365 and violation of the Resource Conservation Recovery Act under 42 U.S.C. § 6972; (6) liability for environmental violations for oil and hazardous substances under 33 U.S.C. § 1321; and (7)

violation of the whistle-blower protection provisions of the False Claims Act under 31 U.S.C. § 3730(h).[7] On November 22, 2005, the Court dismissed fifty-five of the defendants from the case. The remaining defendants in this action are Accent Builders, Inc. (Accent), Superior Gunite (Gunite), American International Group (AIG), Robert G. Kelly (Kelly), National Union Fire Insurance Company of Pittsburgh (National Union), Anthony Federico and Ronald Federico (collectively Defendants). The only

---

[7] The Court notes that Darian *originally filed* a document captioned "Third Amended Complaint" on December 9, 2002. Subsequently, on December 30, 2002, Plaintiff filed a document captioned "Third Amended Complaint Notice of Errata." In an Order, dated January 7, 2003, the earlier-filed document was stricken, and the Court deemed that the subsequently-filed document could serve as plaintiff's Third Amended Complaint.

remaining cause of action is plaintiff's claim for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C. §§ 1961 and 1968. On January 3, 2007, Defendants Accent, Gunite, AIG, Kelly, and National Union filed their Motion for Summary Judgment (Accent Mot.). On January 8, 2007, Defendants Anthony Federico and Ronald Federico filed their Motion for Summary Judgment (Frederico Mot.). Plaintiff filed opposition papers to both motions for summary judgment on March 26, 2007. Defendants filed replies to plaintiff's Opposition to Defendants' Motions for Summary Judgment on April 9, 2007, at which point the Court took the matter under submission.

This action arises out of a construction contract between Darian Construction Company /

Accent (a joint venture) and the State of California Parks and Recreation Department (the State) for renovations of the Malibu Pier at Malibu Lagoon State Beach. (Decl. of Ronald Federico (R. Federico Decl.) at ¶¶ 3, 4.) Plaintiff has asserted a RICO claim, alleging that Defendants engaged in illegal racketeering activities as an "enterprise." (TAC ¶¶ 967-70; Opp'n to Accent Mot. at 12; Opp'n to Federico Mot. at 12.) Plaintiff has further alleged that Defendants threatened Plaintiff in an effort to extort money from him, committed mail and wire fraud, and conspired to obstruct justice by arranging for plaintiff's arrest on false vandalism charges. (TAC ¶ 966, 971-72, 975; Opp'n to Accent Mot. at 13-14; Opp'n to Federico Mot. at 13-14.) Plaintiff alleges that Ronald Federico told Plaintiff that if Plaintiff did not give Ronald Federico

$25,000 or sign over plaintiff's control over the Malibu Pier Project (Project), that Anthony Federico would break plaintiff's legs. (TAC ¶ 966.) Plaintiff also alleges that Ronald Federico warned Plaintiff that Anthony Federico was of Italian heritage, and that Plaintiff would "end up in the bottom of the ocean with cement boots on." (*Id.*) Plaintiff claims that after complaining to Ronald Federico about these threats, Ronald Federico told Plaintiff that he wanted to kill him. (*Id.*) Plaintiff also alleges that Anthony Federico threatened to arrange for individuals with baseball bats to harm Plaintiff if Plaintiff failed to give Anthony Federico $25,000. (*Id.* at 1975.)

Defendants argue that the undisputed evidence demonstrates that they did not engage in any criminal activity and that no "enterprise"

under RICO existed during the time of the alleged illegal conduct. (R. Federico Decl. at ¶ 12.) Defendants also argue that, even if they were involved in a criminal enterprise under RICO, the alleged illegal activities did not constitute a "pattern of racketeering activity," as required by RICO, because the acts occurred during a period of less than a year. (Opp'n to Accent Mot. at 10-12; Opp'n to Federico Mot. at 10-12.)

The Court finds the following facts to be undisputed. Darian Construction Company and Accent formed a joint venture to renovate the Malibu Pier located in Malibu, California, according to the State's bidding procedures. (R. Federico Decl. at ¶ 12.) The State awarded the Project contract to the joint venture on or about June 17, 1999. (Id. at ¶ 3, Ex. A.) Construction for

the Project commenced in October 1999. (R. Federico Decl. at ¶ 7.) Ronald Federico, an Accent employee, acted as the project manager. (*Id.*)

Between October 1999 and January 2000, Defendants Ronald and Anthony Federico made what Plaintiff considered threats. (*Id.* at ¶ 11.) The alleged specific threats were made between October and December 1999, and the alleged extortion threat was made on or about October 27, 1999. (*Id.* at ¶ 14.) Plaintiff obtained restraining orders against Defendants Anthony Federico and Ronald Federico, which expired by their own terms after a court found no evidence of continuing conduct or a continuing need for the restraining orders. (R. Federico Decl. at ¶15.)

On December 30, 1999, Plaintiff instructed the State to withhold payments to the joint venture

for work on the Project. (*Id.* at ¶ 7, Ex. B.) Still obligated to perform under the Contract, the joint venture continued to work on the Project, without payment from the State. (R. Federico Decl. at ¶ 9.) As a result, Accent spent over $350,000 in its own funds to continue work on the Project. (*Id.* at ¶ 9.) As of March 31, 2000, Darian Construction had not contributed any funds to the joint venture. (*Id.* at ¶ 9.) Accent filed an action to appoint a receiver. (*Id.* at ¶ 10, Ex. C.) On June 5, 2000, the Los Angeles Superior Court issued an order appointing David Pasternak as Receiver for the joint venture. (R. Federico Decl. at ¶ 10, Ex. C.) Pasternak completed Phase 1 of the Project, and negotiated termination of the remainder of the contract with the State, replacing the joint venture with a third party contractor for the Project. (R. Federico Decl. at ¶

11.) During the period of the alleged RICO "enterprise," AIG, Union Fire and Robert Kelly (the Insurance Company Defendants) were not engaged in the management or operations of the enterprise. (*Id.* at ¶ 13; Decl. of Mark Pessolano (Pessolano Decl.) at ¶ 4.) The Insurance Company Defendants provided construction security bonds for the joint venture, as required by the Malibu Pier contract terms. (R. Federico Decl. at ¶ 13; Pessolano Decl. at ¶ 3.) The Insurance Company Defendants also authorized payment of funds to Pasternak. (R. Federico Decl. at ¶ 13.)

STANDARD OF LAW

The Federal Rules of Civil Procedure require that courts grant summary judgment if the evidence, including pleadings, discovery responses,

depositions and affidavits, demonstrate that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden to identify a lack of evidence demonstrating that no genuine issues of material fact exist for essential elements of each cause of action in the complaint. *Liu v. Standard Ins. Co.*, 457 F.Supp. 2d 1030, 1035 (C.D. Cal. 2006) (citing *Celotex Corp. v. Catrett*, All U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); *Abromsom v. Am. Pac. Corp.*, 114 F.3d 898, 902 (9th Cir. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 32:5, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). A "material"fact is one that may impact the outcome of the case under substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed.

2d 202 (1986); *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass 'n*, 809 F.2d 626, 630 (9th Cir. 1987). The Court must not weigh the evidence or make credibility determinations, and views the evidence "in the light most favorable to the nonmoving party.'" *T. W. Electric*, 809 F.2d at 630.

The burden then shifts to the nonmoving party. *Liu*, 457 F.Supp. 2d at 1035. In order to survive a motion for summary judgment, the party bearing the burden of proof at trial must establish an essential element to their case. *Celotex*, 477 U.S. at 322. If the nonmoving party is unable to establish an essential element to their case, the Court must grant summary judgment because "complete failure of proof concerning an essential element... necessarily renders all other facts immaterial." *Id.* at 323. In opposition to a motion

for summary judgment, the nonmoving party may not "rest upon the mere allegations or denials of [their] pleading." Fed. R. Civ. P. 56(c). Instead, the nonmoving party's response must establish "specific facts" demonstrating a genuine issue of a material fact. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. If the nonmoving party is unable to meet their burden, the Court must grant summary judgment. Fed. R. Civ. P. 56(e).

DISCUSSION

I. Plaintiff's Failure to Provide Specific Citations to Evidence in the Record

Defendants argue that Plaintiff is unable to demonstrate a genuine issue of material fact on at least one essential element of Plaintiff s RICO claim. In plaintiff's opposition and Statement of

Genuine Issues, he cites to no evidence in the record to demonstrate the existence of a genuine issue of material fact. The law in the Ninth Circuit is clear: the Court has no duty to "comb the record" in an effort to find a reason to deny a motion for summary judgment. *Forsberg v. Pac. Mv. Bell Tel Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988); *Keenan v. Allan.*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030-31 (9th Cir. 2001)[8];

---

[8] As the court in Carmen explains:

The alternative, requiring the district court to search the entire record, even though the adverse party's response does not set out the specific facts or disclose where in the record the evidence for them can be found, is unfair. The cases often refer to the unfairness to the district court, which is substantial, but hardly the full story. If a district court must

Smith v. Marsh, 194 F.3d 1045, 1052 n.5 (9th Cir. 1999). "Judges are not like pigs, hunting for truffles buried in briefs." *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). A contrary rule, in addition to being unfair to the Court and other litigants, would prejudice the moving party. When a Court conducts an independent examination of the record to find evidence to deny Defendants' Motions, "the court becomes the lawyer for [Plaintiff], performing the

---

examine reams or file cabinets full of paper looking for genuine issues of fact, as though the judge were the adverse party's lawyer, an enormous amount of time is taken away from other litigants. Other litigants could have that judicial time, and get their cases resolved better and faster, if the district court could limit examination to the materials submitted in opposition to the summary judgment motion.

lawyer's duty of setting forth specific facts showing that there is a genuine issue for trial" and Defendants are then "denied a fair opportunity to address the matter in the reply papers." *Carmen*, 237 F.3d at 1031.

The Ninth Circuit has held that local rules can provide the nonmoving party with adequate notice that the court will not look beyond opposition papers for evidentiary support. *Nilsson, Robbins, Dalgarn, Berliner Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988). In *Nilsson*, the court refers to a Central District Local Rule matching the exact language of the current local Rule 56-3. 854 F.2d at 1538. This rule states:

> In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material

> facts are (a) included in the "Statement of Genuine Issues" and (b) controverted by declaration or other written evidence filed in opposition to the motion.

L.R. 56-3. The court held that with local rules such as this, the nonmoving parties have sufficient notice that their opposition to a motion for summary judgment must identify genuine issues of material fact, and provide the court with evidence, without the district court's assistance. *Nilsson*, 854 F.2d at 1545.

Factual allegations, conclusory pleadings, legal memoranda, and oral argument are insufficient to establish a genuine issue of material fact and defeat a motion for summary judgment. *Smith v. Mack Trucks, Inc.*, 505 F.2d 1248, 1249 (9th Cir. 1974); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *Nilsson*, 854 F.2d at 1542 (citing *Radobenko v. Automated Equip. Corp.*, 520

F.2d 540, 543 (9th Cir. 1975); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) (citing *Smith*, 505 F.2d 1248, 1249 (9th Cir. 1974)). The Court is only required to review issues argued "specifically and distinctly" in briefs, and evidence in the record to which opposition papers specifically refer. *Entm 't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997); *Carmen*, 237 F.3d at 1030. Opposition papers must provide the court with "adequate references to [evidence], so that it c[an] conveniently be found." *Carmen*, 237 F.3d at 1031; *Taybron v. City and County of San Francisco*, 341F.3d 957, 960 (9th Cir. 2003). "[General references without page or line numbers" are insufficient. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003) (citing Cal.

Practice Guide: Federal Civil Procedure Before Trial § 14:101.1, at 14-24.2)). In this case, Plaintiff has not made any citations to the record, and the Court has no way of understanding what Plaintiff claims to be genuine issues of material fact.

In *Keenan*, the Ninth Circuit affirmed a district court's grant of summary judgment, finding no genuine issues of material fact where the plaintiff failed to support his arguments with specific citations to the record. 91 F.3d at 1275. plaintiff's counsel provided the court with voluminous unorganized evidence, without page numbers, in opposition to the defendant's motion for summary judgment. Id. at 1278-79. The plaintiff's briefs failed to clearly state the material facts in dispute, and the court noted that where it "has succeeded in locating the documents cited, it

has repeatedly found that [the plaintiff] has referred us to conclusory allegations made in her own affidavits and statements of fact presented to the district court, and to irrelevant or inadmissible evidence." *Id.* at 1279.

Similarly, in this action, Plaintiff has provided the Court with a Statement of Evidence and Declarations of Bruce H. Darian in opposition to the motions for summary judgment, which are unorganized, without page numbers, and difficult to follow. Plaintiff's opposition papers appear to be more recitations of the allegations in the Third Amended Complaint. Plaintiff has not cited to the record to support any of these disputed facts, and, like the plaintiff in *Keenan,* Darian has also failed to clearly demonstrate that a genuine issue of material fact exists.

This case also raises the same issues the Ninth Circuit dealt with in Carmen, 237 F.3d at 1026, where the plaintiff submitted an itemized list of dozens of disputed and undisputed facts in her opposition papers. *Id.* at 1028. The plaintiff's papers failed to dispute a material fact for which she had previously submitted supporting evidence to the court, however. *Id.* at 1029. The remaining facts the plaintiff listed did not demonstrate a genuine issue of material fact. *Id.* at 1028. The Ninth Circuit upheld the magistrate judge's decision to grant summary judgment because the statement supporting this material factual dispute was filed along with many other documents in the eight-inch thick case file, which the court was not obligated to review for summary judgment purposes. *Id.* at 1029-30 (agreeing with the Fifth,

Sixth, Seventh and Tenth Circuits that "the district court may limit its review to the documents submitted for the purposes of summary judgment and those parts of the record *specifically referenced therein.*") (emphasis added).

Although the Court is cognizant of plaintiff's pro se status, after three amended complaints, over eighty orders in response to at least as many motions, and seven years of litigation, the Court is confident that Plaintiff is aware of his obligations under the Federal and Local Rules and it can longer excuse his failure to comply with them. Plaintiff has been specifically advised of his responsibilities on numerous occasions, including most recently by Magistrate Judge Jeffrey Johnson, who, in his Minute Order in response to plaintiff's Request for Clarification of Order on Motion on

Joint Stipulation on Unresolved Matters, expressly stated, "[a]s a litigant representing himself, plaintiff has the responsibility to understand and abide by the Local Rules of this Court as well as the Federal Rules of Civil Procedure." (Docket no. 720, filed April 12, 2007.)

The Court has also been patient with Plaintiff and provided him with more than adequate time to file a proper opposition to Defendants' Motions. Defendants' Motions were filed on January 3 and 8, 2007, and originally noticed for a hearing date of January 29, 2007. Accordingly, plaintiff's opposition was initially due on January 16, 2007. Sympathetic to the fact that Plaintiff is a pro se litigant, the Court granted two of Plaintiff s Ex Parte Applications for Extensions of Time to File Oppositions to the Defendants'

Motions for Summary Judgment. (Docket nos. 692, 706.) Under the revised schedule, plaintiff's opposition was not due until March 26, 2007. Instead of as few as eight days, Plaintiff was provided with seventy-seven days in which to formulate a response that properly cited to admissible evidence in the record. Despite his knowledge of his obligation to file an opposition that comported with the Federal and Local Rules, Plaintiff failed to do so. The Court has given Plaintiff every opportunity to make his case and made every allowance possible for his pro se status, but it cannot further prolong this litigation by continuing to forgive his non-compliance with the law.

Without specific citations to evidence supporting plaintiff's alleged factual disputes,

Plaintiff has failed to demonstrate the existence of a genuine issue of material fact on any issue. In light of this, the Court shall consider only the undisputed facts Defendants presented in their Statements of Uncontroverted Facts and Conclusions of Law in determining whether Defendants are entitled to summary judgment on plaintiff's RICO claims.

II. Plaintiff's RICO Claims

Plaintiff claims that Defendants violated RICO by making threats against him, at least one of which constituted extortion. (TAC ¶¶ 966, 975.) Section 1962(c) of RICO prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate of foreign commerce, to conduct or participate, directly or indirectly in the conduct of

such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). Section 1962(d) prohibits conspiracy to violate RICO. *Id.* at § 1962(d).

Defendants argue that they did not violate RICO, because their conduct occurred over a period of only four months and therefore does not qualify as a "pattern" of racketeering activity under RICO. RICO requires at least two acts of racketeering activity within ten years of each other. 18 U.S.C. § 1961(5). Racketeering activities are defined as federal crimes and state law felonies. *Id.* at § 1961(1). A plaintiff must prove "continuity of racketeering activity, or its threat" in order to succeed in a RICO claim. *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241,109 S.Ct. 2893, 2902, 106 L.Ed.2d 195 (1989) plaintiff can

satisfy this standard by "referring either to a closed period of repeated conduct, [known as closed-ended continuity], or to past conduct that by its nature projects into the future with a threat of repetition of known as open-ended continuity]." *Id.*

"Acts occurring during a period of several weeks or months, with no threat of future criminal conduct, do[ ] not satisfy the continuity standard." *H.J. Inc.*, 492 U.S. at 242. For example, in *Religious Tech. Ctr. v. Wollersheim*, the court found that the alleged racketeering activity, which "continued for six months at most," did not satisfy the "continuity" requirement. 971 F.2d 364, 366 (9th Cir. 1992). It also noted that it was unable to find a case "in which a court has held the requirement to be satisfied by a pattern of activity lasting less than a year." *Id.*

Without a bright-line rule from the Supreme Court, the Ninth Circuit has adopted the "substantial period of time" test for determining closed-ended continuity. *Allwaste Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995). Applying this test in *Turner v. Cook*, the court concluded that the continuity requirement was not satisfied where the majority of the criminal activities occurred over two months, and additional criminal acts had "occurred only sporadically in the preceding year." 362 F.3d 1219, 1231 (9th Cir. 2004).

In the instant case, Defendants threatened Plaintiff during the four-month period between October 1999 and January 2000, including the specific threats between October and December 1999, and an extortion threat on October 27, 1999. (R. Federico Decl. at ¶ 11,14.) The conduct at issue

therefore occurred over a period one third shorter than that which the court found insufficient in *Religious Tech. Ctr.* Consequently, the Court finds that Plaintiff has failed to present evidence that the alleged predicate misconduct occurred over a substantial period of time. Similarly, the Court finds that Plaintiff has failed to present any evidence that there was any threat of future criminal conduct. See *Allwaste*, 65 3d at 1528 (holding that open-ended continuity may be satisfied by acts spanning a time period of less than one year if the conduct "by its nature projects into the future with a threat of repetition"). Accordingly, Plaintiff has failed to satisfy the continuity requirement of his RICO claims, and Defendants are entitled to summary judgment.

CONCLUSION

For the foregoing reasons, the Court GRANTS the Defendants' Motions for Summary Judgment (docket nos. 693 and 698). Within ten days of the date of entry of this Order, Defendants shall prepare and lodge a Judgment for the Court's signature.

IT IS SO ORDERED.

June 21, 2007

/s/
FLORENCE-MARIE COOPER
JUDGE UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE DARIAN, Individually
On His Own Behalf, aka SEAL 1
dba Darian Construction, Co.

No. 07-56777

D.C. No. CV-
Plaintiff-Appellant
00-10255-FMC
Central District
Of California,
Los Angeles

and

ORDER

USA, EX REL, as relator on
behalf of the United States
Government, aka Seal 2,
Dba Darian Construction Co.,

Plaintiff,

v.

ACCENT BUILDERS, INC.,
a California Corporation, aka
Seal A International Hardwoods,
Inc., aka Ronald E. Glousman,
MD, ANTHONY LAWRENCE
FEDERICO, aka SEAL B; et al.

Defendants-Appellees.

///

Before: O'SCANNLAIN, SILVERMAN, and BYBEE, Circuit Judges

The appellant's opposed motion for a fifth extension of time to file the opening brief is denied.

The appellant's case is dismissed for lack of prosecution with prejudice to reinstatement. No motions for reconsideration, rehearing, clarification, or modification of this order's provisions will be entertained.

A copy of this order shall act as the court's mandate.

SOUTHERN CALIFORNIA NEUROLOGICAL
MEDICAL GROUP INC.
8631 West Third Street, Suite 531-E
Los Angeles , California 90048
(310) 855-7181
Fax (310) 855-7952

Ronald M. Andman M.D.
Diplomate American
Of Neurorehabilitation

Colin Stokol, MD
Diplomate American
of Psychiatry and
Neurology

March 2, 2009

RE: Darian, Bruce
DOB: 12/11/57

To Whom it May Concern:

Mr. Darian is my patient who has been under my care since September 2008. He has been seen because of complaints of intractable vertigo and instability of gait with balance diminution. The condition has remained persistent and it has not been clearly understood in terms of origin. He works in the construction industry and we have been concerned about safety in height and work spaces.

We have done numerous studies from the neurologic standpoint and the ENT standpoint, to try to understand the cause of the pathology. The studies obtained include a brain MRI done in August 2008, which was normal and brainstem auditory evoked response study which appeared unrevealing in terms of latencies, although definition was poor on the right side. An electrode/ nystagmogram was done by the ENT service suggesting left sided ear pathology.

The patient has had multiple consultations including myself (neurology) as well as , an ENT specialist (Dr. Flaum), a neurootologist at UCLA (Dr. Baloh), and Dr. Howard Allen.

A clear explanation for his symptoms has not been clearly delineated.

He remains symptomatic.

Respectfully yours,

/s/

Colin W. Stokol M.D.
CWS/km

cc: Eugene Flaum, M.D.
8631 W. 3rd Street. Ste. # 625-E
Los Angeles, CA 90048
Howard N. Allen, M.D.
8635 W 3rd Street Ste. #1190-W
Los Angeles, CA 90048

Docket No 09-405

Supreme Court, U.S.
FILED
JAN - 4 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendants-Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR REHEARING

Bruce H. Darian
P.O. Box 42
Hollywood, CA 90028
Tel. 310-428-8131
Fax 310-374-0134

QUESTIONS PRESENTED FOR REVIEW

1. Is the United States a plaintiff in all False Claims Act actions thereby allowing a Qui Tqm Relator 60 days from final order to file an appeal?

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

UNITED STATES OF AMERICA *ex rel.* DARIAN

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMMENT OF PARKS AND RECREATION, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, CALIFORNIA CONTRACTORS STATE LICENSE BOARD, CALIFORNIA OCCUPATIONAL SAFTEY AND HEALTH

ADMINISTRATION, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, JUDICIAL COUNCIL OF CALIFORNIA, LOS ANGELES SUPERIOR COURT, LOS ANGELES SUPERIOR COURT SANTA MONICA, LOS ANGELES COUNTY SANITATION DISTRICT #2, LOS ANGELES COUNTY DISTRICT ATTORNEY, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, MALIBU LOST HILLS DIVISION, LAS VIRGENES MUNICIPAL WATER DISTRCT, CITY OF MALIBU, PEPPERDINE UNIVERSITY, GOVERNOR GRAY DAVIS, CALIFORNIA ATTORNEY GENERAL BILL LOCKYER, HONORABLE PATRICIA COLLINS, HONORABLE LAWRENCE MIRA, COMMISSIONER TERRY ADAMSON, RUSTY AREIAS, REGINALD DEMERY,IAN GAVINE, DAVE PETTWAY, TIM LA FRANCHI, TARA TODD, DARLENE ATKINSON, DOUGLAS WITT, TOM CARVER, GARY STEVENS, RICHARD BARTON, C. LANCE BARNETT, MIKE BROWN, PAM ALBERTI, MARIANE HENKEL, GLORIA R. LANGLEY, JANEECE R. HARDS, BILL SIENER, RENE GARCIA, DENNIS DICKERSON, WENDY PHILLIPS, LEROY BACA, MARTIN L. HERSCOWITZ, MIKE WILSON, ALLYSON KIMMEL, MARNA MILLER, JOHN O'BRIEN, THOM BRADSTOCK, PAT MAY, ERNESTO MASSONE, DON WIPPERT, CHRISTI HOGIN, JAMES COLBAUGH, WAYNE K. LEMIEUX, PHIL E. PHILLIPS, AMERICAN INTERNATIONAL COMPANIES, AMERICAN INTERNATIONAL GROUP, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH INC., MALIBU BAY CO., LAMBERSON KOSTER & CO., INTERNATIONAL HARDWOODS, SUPERIOR GUNITE INC., ACCENT BUILDERS INC., FYFE CO. INC., FIBRWRAP CONSTRUCTION CO. INC., DCA DRILLING AND CONSTRUCTION INC., HALCO SERVICE CORP., BOOKOUT PLUMBING INC., ARROW SECURITY, A. JEROLD PERENCHIO, ANTHONY

LAWRENCE FEDERICO, RONALD RAY FEDERICO, ED N. FYFE, HEATH CARR, HAROLD ORUM, HAROLD BOOKOUT, ROBERT G. KELLY, SUSAN GANNUSCIO, DON ROBINSON, DOES 1-10

Defendants-Respondents.

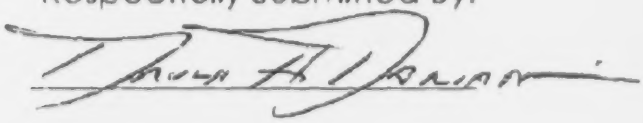
iii

CORPORATE DISCLOSURE STATEMENT

Appellant, Relator Bruce Darian owner of Darian Construction Co. is a sole proprietorship.

DATED: January 2, 2010

Respectfully Submitted By:



BRUCE H. DARIAN, In Pro Se
P.O. Box 42
Hollywood, CA 90028

IV

TABLE OF CONTENTS

Table of Authorities . . . . . iv-vii

Statement of Jurisdiction 1

Statement of the Case 1-2

Introduction 2-3

Statement of Facts 3-4

Summary of Argument 4-5

Argument I 5-15

Standard of Review 59-62

Conclusion 17-18

Statement of Related Cases 18

V

TABLE OF AUTHORITIES

United States Supreme Court

United States ex rel. Eisenstein v. City of New York, Et. Al. 129 S. Ct. 2230: 173 L. Ed. 2d. 1255; 2009 U.S. LEXIS 4316. (2009). 1

Schor, 478 U.S. at 856 5,14

Morrison v. Olsen 487 U.S. at 695 101 L. Ed. 2d 569, 108 S. Ct. 2597.. 6,7,8,9,11,12,13,14

Nixon v. Administrator of General Services 433 U.S. 425, 443, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977)). 6

Bowsher v. Synar, 478 U.S. 714, 726, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) 12,16

Buckley 424 U.S. 1 at 123, 46 L. Ed. 2d 659, 96 S. Ct. 612. 13

Mistretta v. United States, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) 16

Communications Workers of America v. Beck, 487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). 16

Fullilove v. Klutznick, 448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) 17

9th Circuit Cases

Kelly v. Boeing
9 F .3d 743; 1993 U.S. App. LEXIS 2888 8,11,12,14,15

Gray v. First Winthrop Corp.,
989 F.2d 1564, 1567 (9th Cir. 1993). 16

U.S. District Court

United States, ex rel. Truong v. Northrop Corp.
728 F. Supp. 615, 622 (C.D. Cal. 1989) 10

United States, ex rel. Stillwell v.
Hughes Helicopters, Inc.,
714 F. Supp. 1084, 1093 (C.D. Cal. 1989). 10

STATUTES

U.S. Const. art. II, § 3. 6

U.S. Const. art. III, ... 13

28 U.S.C. § 596(a)(3)). 9

28 U.S.C. § 593(b). 9

31 U.S.C. § 3730(c)(2)(A). 10

31 U.S.C. § 3730 (c)(2)(C). 12

28 U.S.C. § 593(e) 12

31 U.S.C. § 3730(b). 15

Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 Yale L.J. 1069, 1070 (1990) 7

VI

STATEMENT OF JURISDICTION

Relator has filed his Petition for Rehearing within 25 days from the Court's December 7, 2009 Orders denying the Petitions For Writ of Certiorari review. Docket Numbers 09-405 and 09-406.

VII

STATEMENT OF THE CASE

On June 8, 2009 this Court issued a ruling in United States ex rel. Eisenstein v. City of New York , Et. Al. 129 S. Ct. 2230: 173 L. Ed. 2d. 1255; 2009 U.S. LEXIS 4316. (2009).affirming the second circuit's order establishing that the United States is not a Plaintiff and a party to a Qui Tam False Claims Act action. This ruling is of substantial importance and is intervening to both of Relator's related case in

docket numbers 09-405 and 09-406. Under this finding by the Court, Relator's cases are barred because of a Jurisdictional issue by not filing both appeals within 30 days from final order. However well settled ninth circuit authority for a Qui Tam action recognizes the United States as a party and the filing of an appeal was 60 days from final order.

VIII

INTRODUCTION

Relator brings this Petition for Rehearing on an essential and important issue as to whether the United States is a Plaintiff and party to a False Claims Act action when it is filed and subsequently conducted by the Relator. This important issue is national in scope and goes to

the heart of the False Claims Act. It establishes the President's ability to prosecute the laws of the United States under Article II of the Constitution. How Congress has the right to enact the laws of the United States under Arlicle I of the Constitution, and for the Judiciary to accurately interpret the laws as written to uphold the balance of power in our tripartite government.

Congress' intention taken as a whole has been to allow the President to enlist the help of the citizenry thereby deputizing them to act as a "posse" to recover the United States' money and that of no one else.

IX

STATEMENT OF FACTS

Relator filed two Petitions for Writ of Certiorri from two Ninth Circuit cases deriving from one U.S. District Court case from the Central District in California filed on September 21, 2000 under the False Claims Act. This Court on December 7, 2009 denied both Petitions docket numbers 09-405 and 09-406.

X

SUMMARY OF ARGUMENT

The United States is the Plaintiff and Party to all False Claims Act actions thereby allowing the President to prosecute the laws of the United States under his U.S. Constitution Article II authority. Relator's partial and supervised statutory right to prosecute the action with the Executive's oversight goes back to the founding of this Country and

history shows that it started well before the thirteenth century. By the latin words " "qui tam pro domino rege quam pro se imposo sequitur," which is interpreted as "who brings the action as well for the king as for himself." The very Latin words themselves explain that Qui Tam is for the King and the person.

XI

ARGUMENT 1

Is the United States a plaintiff in all False Claims Act actions thereby allowing a Qui Tam Relator 60 days from final order to file an appeal?

The Supreme Court has established that [HN10] where an act of Congress arguably threatens the integrity of another branch's authority and independence, the proper separation of powers inquiry is whether Congress has "impermissibly undermined" the role of that branch. *Schor*, 478 U.S. at 856. This is the test which we apply to the

qui tam provisions of the FCA. In other [*751] words, we must consider whether the qui tam provisions "'disrupt[] the proper balance between the coordinate branches [by] preventing the Executive Branch from accomplishing its constitutionally assigned functions.'" *Morrison*, 487 U.S. at 695 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977)). [**24] To determine whether the qui tam provisions undermine the role of the Executive Branch, we must decide whether, within the meaning expressed in *Morrison*, these provisions accord the Executive Branch "sufficient control" over the conduct of relators to "ensure that the President is able to perform his constitutionally assigned duties." [6] *Morrison*, 487 U.S. at 696, 101 L. Ed. 2d 569, 108 S. Ct. 2597.

> For purposes of this case, the relevant presidential duty is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The authority most analogous to this case is *Morrison v. Olson*, in which the Supreme Court held that the independent counsel provisions of the Ethics in Government Act do not impermissibly interfere with the functions of the Executive Branch in violation of the separation of powers principle. 487 U.S. at 697. *Morrison* provides a baseline against which we may assess whether Congress has unconstitutionally diminished [**25] executive power by permitting private plaintiffs to sue in the name of the United States for an injury to the

federal treasury. Comparison to *Morrison* is particularly useful because that case considers the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch. prosecute violations of law. [7] It is clear to us that no such absolute rule exists. *Morrison* itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "it is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. The Court also stated in *Morrison* that "there is no real dispute that the functions performed [**26] by the independent counsel are 'executive' in the sense that they are law enforcement functions that *typically* have been undertaken by officials within the Executive Branch." 487 U.S. at 691 (emphasis added). Use of the word "typicaliy" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not *always* be undertaken by Executive Branch officials. See Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 Yale L.J. 1069, 1070 (1990) (Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). Thus, we reject Boeing's

assertion that *all* prosecutorial power of any kind belongs to the Executive Branch.

The Court in Kelly v. Boeing identified all possible means of executive control in a qui tam action to that identified in an Ethic in Government Act action as determined in Morrison v. Olson 487 U.S. at 696.

Morrison identifies several means by which the Executive Branch can control an independent counsel's exercise of the powers outlined above. First, no independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request an appointment is unreviewable. Second, the Attorney General retains the power to remove an independent counsel, though only upon a showing of "good cause." The Act requires the Attorney General to submit a report to the Judiciary Committees of the House and the Senate and to a special court responsible for appointing independent counsels specifying the grounds for removal. *Morrison*, 487 U.S. at 663 (citing 28 U.S.C. § 596(a)(2)). The Attorney General's removal authority is further limited by the Act's provision that an independent counsel can obtain judicial review of the Attorney General's removal action by filing a civil suit. The Act authorizes the reviewing

court to grant reinstatement or "other appropriate relief." *Id.* at 663-64 (citing 28 U.S.C. § 596(a)(3)).

Third, the independent counsel's "jurisdiction" is defined with reference to the facts submitted by the Attorney General upon requesting an appointment. However, it is the special court charged with appointing an independent counsel that actually defines the counsel's prosecutorial jurisdiction. *Id.* at 661 (citing 28 U.S.C. § 593(b), 679. [9] Finally, the Act requires the counsel to abide by Department of Justice policies, unless it is not possible to do so. *Morrison*, 487 U.S. at 696. The Court concluded that these features give the Executive Branch "*sufficient control* over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* (emphasis added). We note that the Court reached this conclusion despite the fact that the Attorney General's unreviewable discretion to request appointment of an independent counsel is the only unconditional means of executive control which the Ethics in Government Act provides.

The President has the power to control a False Claims Act by his ability in the Executive Branch to intervene and take primary charge for prosecution although not absolute. He case move for dismissal of the case and can seek a stay of the Relator's

discovery. The Executive can seek any other manner to settle an action.

It is well settled that the Court must approve the government's decision to terminate a case brought on behalf of the United states U.S. ex rel. Troung v. Northrop Corp. 728 F. Supp. 615, 622 (C.D. 1989; U.S. ex rel. Stillwell v. Hughes Helicopters Inc. 714 F. Supp. 1084, 1093 (C.D. Cal. 1989).

The Attorney General can only suggest to a court to terminate an independent counsel as the Morrison court held, but under the FCA he can provided relator is entitled to a hearing 31 U.S.C. 3730©(2)(A).

The Morrison court found that even with the Executive's control over an independent counsel there is a reduced control the Attorney General

has and through him the President exercises Morrison, 487 U.S. at 695. The Kelly court found that the Executive Branch exercises at least the same amount of control in an FCA action giving it sufficient means of controlling or supervising relators to satisfy separation of powers concerns. These findings would be meaning less if it is not true that the United States is always a party to an FCA action.

In addition to considering whether the Ethics in Government Act taken as a whole violates the separation of powers principle, the Court in *Morrison* also specifically addressed whether the provision of the Act restricting the Attorney General's [**39] power to remove an independent counsel, taken by itself, impermissibly interferes with the President's exercise of his functions. 487 U.S. at 685. The Court held in *Morrison* that the "good cause" restriction on the Attorney General's power to remove an independent counsel does not violate separation of powers. *Id.* at 693. The essence of the Court's removal analysis in *Morrison*, based on its interpretation of prior removal jurisprudence, is an inquiry into whether Congress has impermissibly encroached on executive power

by limiting presidential removal authority. *Id.* at 685-93. *See also Bowsher v. Synar*, 478 U.S. 714, 726, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."). The Court found no such encroachment evident in the independent counsel provisions. *Morrison*, 487 U.S. at 691.

In light of the attention paid to the removal issue in *Morrison*, we have considered whether the lack of a provision permitting the government to "remove" a relator invalidates [**40] the qui tam provisions. [HN12] Short of dismissing a qui tam action, the government can only seek *limitation* of a relator's participation in a case. 31 U.S.C. § 3730 (c)(2)(C). However, the concept of removal does not make sense in the qui tam context, in which there is no "office" from which to remove the relator and subsequently fill with someone else. *Cf. Morrison*, 487 U.S. at 664 (discussing procedures for terminating the "office" of an independent counsel). In contrast to independent counsels, relators are not replaceable. *Cf. id.* at 662 n. 5 (special court which appoints independent counsels authorized under 28 U.S.C. § 593(e) to fill vacancies due to death, resignation or removal of an independent counsel). The only practicable way to "remove" a relator is to end the qui tam litigation -- and this the government has power to do. While the government's power to end qui tam litigation is qualified, so is the government's power to remove an independent counsel; [16] thus, these aspects of the two Acts are not meaningfully distinguishable for purposes [**41] of separation of powers analysis. Kelly v. Boeing 9 F .3d at 760

Judicial Encroachment.

We have discussed in the preceding the central separation of powers issue presented to us in this appeal -- that is, whether Congress has impermissibly undermined the role of the Executive Branch by permitting private parties to exercise some measure of prosecutorial authority. We must also resolve a distinct, but in this case less difficult, separation of powers [**42] problem: whether the qui tam provisions disrupt the proper balance of power between the three branches by permitting the Judicial Branch to encroach [*756] on executive authority. We recognize the general rule that [HN13] under Article III, courts may not exercise "executive or administrative duties of a nonjudicial nature." *Buckley*, 424 U.S. 1 at 123, 46 L. Ed. 2d 659, 96 S. Ct. 612. The purpose of this rule is "to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Morrison*, 487 U.S. at 680-81.

In light of *Morrison*, we believe it is not dispositive that no direct analogue exists for judicial authority to determine whether the government has demonstrated good cause to take over a case prosecuted in the name of United States. [18] This power may affect the government's prosecutorial discretion to some degree, but it does not amount to the power to supervise the prosecutorial conduct of either the

Attorney General or a relator. Cf. *Morrison*, 487 U.S. at 681 ("The Act simply does not give the [special court] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority.") By comparison, we note that *Morrison* approved a scheme in which the Attorney General relinquishes *all* unqualified prosecutorial discretion with respect to a matter referred to an independent counsel once he or she has [*757] decided to request appointment of a counsel. Moreover, *Morrison* specifically held that the provision that the Attorney General must show "good cause" to remove an independent counsel and that the removal decision is subject to judicial review does not offend constitutional principles by permitting excessive [**46] judicial involvement. *Id* at 691.

The kelly court found in looking at the case in Schor, 478 U.S. at 851 and under Article III of the Constitution that the False Claims Act does not authorize the judiciary to infringe on the authority to the degree beyond that established in Morrison, to be able to intervene.

Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive

Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the *Morrison* Court found the Executive Branch exercises over independent counsels. Therefore, we conclude that the qui tam provisions of the FCA do not "impermissibly interfere" with the President's exercise of his constitutionally assigned duties. Nor do the provisions disrupt the "proper balance" between the branches, because, like the Ethics in Government Act, the FCA permits the Executive Branch to retain "sufficient control" over prosecutorial functions. [19] Finally, the provisions do not authorize constitutionally impermissible judicial encroachment on executive power. Kelly v. Boeing 9 F .3d at 760

But in the FCA context, Congress has created a scheme in which the interests of the private prosecutor (that is, the relator) coincide with the public interest in remedying harm to the federal treasury. Under the explicit terms of the Act, a qui tam action is taken on behalf of *both* the government and the relator, indicating that the two share a single interest in successful litigation. *See* 31 U.S.C. § 3730 [**57] (b). Indeed, the only private interest at stake in a qui tam action is the interest which Congress has created in a reward for successful prosecution; thus the public's interest in successfully enforcing the FCA and the relator's private interest are intertwined rather than conflicting. Kelly v. Boeing 9 F .3d at 765

XII

STANDARD OF REVIEW

[HN3] We review de novo the purely legal question whether a statute is constitutional. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) [**11] (quoting *Bowsher v. Synar*, 478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. *Communications Workers of America v. Beck*, 487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). Our

adherence to this principle of presumptive constitutionality is guided by our understanding that "when we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.'" *Fullilove v. Klutznick*, 448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (citation omitted).

XIII

CONCLUSION

Relator respectfully requests that the Court hear this case as it's prior ruling from the second circuit's case is bad law and should be reversed.

"Let us have faith that right makes might"

--Abraham Lincoln

DATED: January 2, 2010

Respectfully Submitted By:

BRUCE H. DARIAN, Pro Per
P.O. Box 42
Hollywood, CA 90078

By _____
United States of America ex rel. Darian

XIV

STATEMENT OF RELATED CASES

Appellant certifies that there is a known related Petition for Rehearing pending in the Supreme Court. Docket No. 09-406

CERTIFICATE OF COMPLIANCE

UNITED STATES OF AMERICA ex rel. DARIAN

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMMENT OF PARKS AND RECREATION, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, CALIFORNIA CONTRACTORS STATE LICENSE BOARD, CALIFORNIA OCCUPATIONAL SAFTEY AND HEALTH ADMINISTRATION, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, JUDICIAL COUNCIL OF CALIFORNIA, LOS ANGELES SUPERIOR COURT, LOS ANGELES SUPERIOR COURT SANTA MONICA, LOS ANGELES COUNTY SANITATION DISTRICT #2, LOS ANGELES COUNTY DISTRICT ATTORNEY, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, MALIBU LOST HILLS DIVISION, LAS VIRGENES MUNICIPAL WATER DISTRCT, CITY OF MALIBU, PEPPERDINE UNIVERSITY, GOVERNOR GRAY DAVIS, CALIFORNIA ATTORNEY GENERAL BILL LOCKYER, HONORABLE PATRICIA COLLINS, HONORABLE LAWRENCE MIRA, COMMISSIONER TERRY ADAMSON, RUSTY AREIAS, REGINALD DEMERY,IAN GAVINE, DAVE PETTWAY, TIM LA FRANCHI, TARA TODD, DARLENE ATKINSON, DOUGLAS WITT, TOM CARVER, GARY STEVENS, RICHARD BARTON, C. LANCE BARNETT, MIKE BROWN, PAM ALBERTI, MARIANE HENKEL, GLORIA R. LANGLEY, JANEECE R. HARDS, BILL SIENER, RENE GARCIA, DENNIS DICKERSON, WENDY PHILLIPS, LEROY BACA, MARTIN L. HERSCOWITZ, MIKE

WILSON, ALLYSON KIMMEL, MARNA MILLER, JOHN O'BRIEN, THOM BRADSTOCK, PAT MAY, ERNESTO MASSONE, DON WIPPERT, CHRISTI HOGIN, JAMES COLBAUGH, WAYNE K. LEMIEUX, PHIL E. PHILLIPS, AMERICAN INTERNATIONAL COMPANIES, AMERICAN INTERNATIONAL GROUP, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH INC., MALIBU BAY CO., LAMBERSON KOSTER & CO., INTERNATIONAL HARDWOODS, SUPERIOR GUNITE INC., ACCENT BUILDERS INC., FYFE CO. INC., FIBRWRAP CONSTRUCTION CO. INC., DCA DRILLING AND CONSTRUCTION INC., HALCO SERVICE CORP., BOOKOUT PLUMBING INC., ARROW SECURITY, A. JEROLD PERENCHIO, ANTHONY LAWRENCE FEDERICO, RONALD RAY FEDERICO, ED N. FYFE, HEATH CARR, HAROLD ORUM, HAROLD BOOKOUT, ROBERT G. KELLY, SUSAN GANNUSCIO, DON ROBINSON, DOES 1-10

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains (2,997) words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 2, 2010

BRUCE H. DARIAN

CERTIFICATION OF PETITIONER

Petitioner certifies that this Petition is presented in good faith and not for delay. The grounds for this Petition for Rehearing are limited too intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 2, 2010

BRUCE H. DARIAN